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Manual of California Land Title Law

Compiled by

George W. Hope

Published by

The Recorder Printing and Publishing Co.

jointly with

California Pacific Title Insurance Co.

San Francisco, California

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INTRODUCTION

This Manual of California Land Title Law was originally compiled by the California Pacific Title Insurance Company for its own use. Because of their interest in it the work has been made available to other title companies. So far as we know it is the first attempt by a title company to create a comprehensive, systematic compilation of this character. Undoubtedly errors will be found, and use of the book will indicate changes in form which will increase its value. We request that any user of the book who discovers errors, or who has any suggestion for its improvement, call the matter to the attention of this company in order that proper corrections can be made in subsequent revisions of the work.

In order to provide for supplement and expansion, page numbers are left blank at the end of each subject. The plan has been to indicate the end of each subject by the words "End of Subject", and to commence the next subject with a number which is a multiple of five. For example: The first subject "California Land Titles—Historical Review" ends with page 8. The next subject "United States Public Lands" begins with page 15. The subject "Aliens" begins with page 75 and ends with page 88. The next subject "Bankruptcy" begins with page 95. In this way space is left at the end of each subject for additional material on that subject.

A thin coin, (if you have one), can be used as an instrument to loosen the screws.

California Pacific Title Insurance Company.

CALIFORNIA LAND TITLES

HISTORICAL REVIEW

*****

HISTORICAL:

California until the year 1822 was an overseas possession of Spain by right of discovery. Its government, outside of the missions, was purely military, taking authority thru the Viceroy of Mexico from the Crown of Spain, speaking by its Royal Council of the Indies.

Independence from Spain and allegiance to Mexico was proclaimed at Monterey, April 9, 1822, and thereafter California was ruled by governors and their subordinate officials with a representative in the Mexican Congress.

The American Flag was raised at Monterey July 7, 1846, upon commencement of hostilities with Mexico, forestalling the claims of England, Russia and France. At the close of the war the treaty at Guadalupe Hidalgo, proclaimed by the President, July 4, 1848, gave California to the United States with the provision that bona fide Mexican property rights should be "inviolably respected". California was admitted into the Union as a State by Act of Congress approved September 9, 1850.

DIVISION OF PUBLIC DOMAIN:

A knowledge of the disposition of the public domain of the United States is essential to a proper understanding of California titles, and the laws which govern them. They consist primarily of what are known as "Land Grants", including -

1. Mexican land grants
2. State land grants
3. Railroad land grants

in addition to which must be considered the former Preemption laws, repealed in 1891, the Homestead, Timber and Stone and Desert entries; also lands within Military and Indian reservations, National parks and Forest reserves, Mining lands held under license or patented and Townsite entries.

MEXICAN LAND GRANTS:

Under the treaty at Guadalupe Hidalgo, Mexican land grants took priority over other claims and in 1851 Congress appointed a Board of Land Commissioners to which all such claims, "floating" or "in place", had to be presented for determination, subject to review by the Federal Courts. Upon adjudication Mexican grants and claims were allowed or rejected. Many were spurious, a considerable number having been irregularly donated by the Mexican governors to their friends or adherents for political reasons or to forestall American possession. Some had lapsed by abandonment and some were too vague to be

located. Successful claimants received a patent upon approval and survey. Rejected titles were dropped out. The United States Supreme Court decided in 1861 that the patent carried title to all minerals within the boundaries of the grant. In a few cases where the holder of a Mexican ranch title, subsequently rejected, had deeded his land in parcels to settlers, Congress passed a remedial act in favor of bona fide purchasers to avoid the hardship of forfeiture. The records in many counties contain deeds and instruments to so-called Spanish ranches, and references to the same, which never obtained legal recognition and are now ignored.

DIVISION OF SPANISH AND MEXICAN CLAIMS:

These were of four main classes.

1. Grants by specific boundaries, giving the donee everything within the exterior lines.

2. Grants by quantity, giving the donee a certain number of acres in a specified locality.

3. Grants of a certain named rancho, leaving the acreage and boundaries to be ascertained by testimony.

4. Grants of the Pueblo lands to the embryo cities around the presidios or missions.

CITY LANDS:

Regarding Pueblo lands, title comes to the United States by treaty subject to the rights of Mexican claimants, from the United States to the city by patent and from the city to two classes of persons:

(a) Those who acquired by purchase from the city of its unoccupied lands sold for revenue purposes; and

(b) Those who derive their interest as successors to occupants and settlers under the laws of Mexico and whose rights were preserved to them by treaty.

Our courts have held that the cities which succeeded to the Mexican pueblos held the pueblo lands in trust for the inhabitants and that the State Legislature is empowered to control the execution of this trust.

LAW GOVERNING:

In dealing with California titles it should be remembered that the Statute of April 13, 1850, adopted the common law of England, and not the Mexican law, as the law of the land when not repugnant to the Constitution of the United States or of the State (4468 Pol. Code) and so late as 1917, Justice Henshaw, with four judges concurring, ruled that where the codes are silent the English common law prevails.

STATE LAND GRANTS:

The Congressional act creating the State imposed the condition that no law should ever be passed impairing the right of the United States to dispose of its lands within the State, and that no taxes or assessments should ever be laid upon the same. Thus it becomes necessary to look behind a State patent as a source of title and ascertain

that the land has been either granted to the State, or, in the case of lieu lands, that the State selection has been approved and has been relinquished by the General Land Office at Washington, D. C. It has been the custom of the State authorities to sell such lands upon selection, and prior to Federal approval and relinquishment, and to issue certificate of sale to purchasers. Under Section 3521, Political Code, no patent can issue from the State until such approval.

The State upon its creation as such took two classes of lands:

1. Those it owned by virtue of grants from the United States; and

2. Those it owned by reason of its sovereignty, such as the shore of the sea and of its bays and inlets. All tide lands below high-water mark not disposed of by Mexico, became State lands on admission, subject to rights of navigation and fishery, and so did lands uncovered by the recession of inland lakes.

As an aid to public education and maintenance of schools the State took the Congressional grant of Sections 16 and 36 in every township, and where these sections fell short by reason of prior possession and other causes, lands of equal area known as "lieu" lands could be selected in their stead.

Half a million acres for internal improvement under the act of Congress of 1841 came to the State on her

admission, not by title to any specific lands but by quantity to be selected later from the public domain; seventy-two sections were granted to the State for a seminary of learning. In 1850 the Swamp and Overflow lands were granted to California by Congress.

The 150,000 acres granted the State for an agricultural college are under control of the Regents of the University, and moneys from sale of same, and of the 72 seminary sections, and of 10 sections granted for erection of public buildings is invested under their authority, while school land sale and alienation is supervised by the surveyor general.

About 200 sections of the Political Code pertain solely to the property of the State, its selection, sale and alienation. A title man should acquaint himself, at least in a general way, as to how this great body of land passes from the United States. These lands have passed through various State authorities into the hands of purchasers by different processes of acquirement or selection duly confirmed, sale evidenced by certificate. Often numerous assignments and deeds appear of record before the patent is given, for under No. 3519, Political Code, this patent issues in the name of the original applicant and inures to the benefit of his legal successors. A complete chain of title must therefore appear of record from the patentee (the original purchaser) to the actual owner of the land.

RAILROAD LAND GRANTS:

To encourage the opening up of undeveloped territory, liberal grants were in past years made to railroad companies from the public domain, which grants included land for rights of way, depot sites and tracks, and the alternate, odd-numbered, sections within defined limits on either side of the roadbed, and, as in the case of State School grants, indemnity or lieu lands were given for such of the alternate sections that were unavailable within the lines of the primary grant; these lieu lands were usually confined to a belt of territory lying adjacent to and parallel with the original grant.

Where patents have issued they usually reserve the minerals as provided by the Act of 1862, sometimes they reserve the minerals, except coal and iron.

The question as to whether lands are mineral or not, and the final decisions thereupon are matters of moment to purchasers from the Railroad Company for unpatented lands, whose deeds to them purport to convey whatever interest the grantor "may hereafter acquire under United States patent". This is vital in the case of oil lands. A searcher's summing up of the title must be made subject to reservations in United States patents.

Lands within the primary grant are known as "floating" lands until the definite location and approval of the railroad, and as "in place" lands thereafter, and title passes finally as of the date of the original land

grant. The indemnity selections have no such certainty, and although selected and sold on contract by the Railroad Company they depend on deficiencies in the "in place" sections, and the list of selections made must be investigated, passed on, and certified to by the Secretary of the Interior.

The records sometimes show that these lieu land unapproved selections have been taken up by settlers. An examination of the Federal records of the district should be made, or, in case of doubt, a statement from the Land Office at Washington, D. C., procured.

(End of subject)

UNITED STATES PUBLIC LANDS

The United States system of land surveys was originated in 1784 by the Continental Congress, Thomas Jefferson being President of the committee in charge. The first enactment was passed May 10, 1785, providing that the "Western Territory" should be divided into townships of 6 miles square by lines running due North and South and others crossing them at right angles. We have 14 principal meridians of which 3 govern such lands in California, the Mount Diablo Meridian, covering central California and Nevada; that of San Bernardino obtaining in the South and the Humboldt Meridian in the North.

The boundaries of the public lands once established, approved by the Surveyor-General and accepted by the Government, are unchangeable.

In practice we find that, owing to the curvature of the earth's surface, the township squares are shorter on the North line than on the South and the angles, owing to faulty surveying, are not all right angles.

The townships are divided into 36 sections, each one mile square or 80 chains on the four outside lines, containing 640 acres. The sections are numbered from 1 to 36 commencing at the northeast corner and proceeding west and east alternately thru the township. A quarter section is 160 acres, and a "quarter-quarter" 40 acres.

In subdividing a township into sections the survey

commences at the southeast corner and, proceeding west along the south boundary, projects lines north one mile apart. The same method is pursued north along the east boundary for the east and west lines. Thus any surplus or shortage is thrown into the northern and western tiers of sections.

The residuary portion of an irregular section, after the subdivision into as many quarter-quarters as it is susceptible of, is divided into numbered lots lying along the north and west lines of the township.

On the United States land office maps the Mexican ranchos are shown by an exterior boundary line with a lot number to distinguish them and no interior lines. Rejected land grants are sectionized. Some of these ranchos were surveyed into Spanish sections which should be 482 acres or 69.44 chains on each side.

Care must be exercised in searching titles where the government surveys and these ranch boundaries meet. Owing to inaccurate contract survey work there is often a shortage or a surplus, and though the chain of title may be perfect on each side of the line, one or other of the owners is short on acreage. Such lands should be described by metes and bounds, using the ranch line as a tie.

Some Mexican ranchos have been surveyed by the owners into townships and sections to harmonize with adjoining government surveys. Descriptions in deeds referring to these sections were upheld in 116 Cal. 596.

UNITED STATES HOMESTEADS:

A United States Homestead is a parcel of the public domain which has been settled upon by the entryman and has been entered in the proper United States Land Office for patent, as required by the Acts of Congress providing for such homestead entries. It is not to be confused with the homestead which may be created from property already owned by the persons creating the homestead under state statutes, in order that such property cannot be sold to satisfy the debts of the owner of such property. The Federal homestead law requires a certain period of residence upon the property, and certain improvement thereof before patent will issue to the entryman. Proof of compliance with the various provisions of the Act must from time to time be filed in the land office.

No title is acquired that can be conveyed until final proof, payment of fees and certificate issued. Even after final proof and transfer to a third party, the bona fides of the original entryman can still be attacked by the government until patent is issued (176 U. S. 448). An exception is made as to deeds for school purposes, rights of way for public utilities, etc., made before proof. The Land Department has ruled that a deed of the homestead made in contemplation of death prior to final proof, is an attempted testamentary disposition and not an alienation under Section 2291 of the Revised Statutes, and the heirs may proceed to acquire the title.

Lieu land and Indemnity selections claimed by the State or by Railroads under Congressional grants confer no vested rights until approved by the Interior Department (133 U. S. 496).

Indemnity selections under the school land grant to the State require no patent from the United States, in whom title remains vested until certified lists are finally issued to the State by the Interior Department.

The creation of a Forest Reserve under Act of March 3, 1891, defeats selection prior to approval (133 U. S. 496).

MINING CLAIMS:

Under certain acts of Congress where mines are discovered upon the public domain, the discoverer may occupy and work the same without applying for patent therefor, provided there shall be expended upon each mining claim or upon an adjoining claim for the benefit of such claim at least one hundred dollars each year.

Though title to a mineral claim is possessory only prior to patent dependent on certain acts and duties to be performed, still such title as it may be is treated by the courts generally as practically a title in fee. It may be deeded, mortgaged, leased and passed by will or by descent to heirs under the laws of succession until actual abandonment or loss by adverse claim.

RAILROAD GRANTS:

To stimulate the construction of railroads during the early development of the West, grants of rights of way to be

subsequently located, and grants of large areas of the public domain were made to various railroads by specific acts of Congress. Under these acts patents were afterwards issued to the railroads in question covering the lands specified.

Congressional grants to Railroads within the original place limits are usually construed as present grants, the patent which follows being considered as a confirmation of same and not a conveyance in itself. These grants are open to attack prior to patent by proof of mineral character, or on account of valid homestead or pre-emption rights existing, and after patent the question of mineral character may be raised.

The original grant to the State of the 16th and 36th sections for school purposes is an absolute present grant.

SWAMP AND OVERFLOW LANDS:

As to the original grant to the State in 1850, the United States Supreme Court has held that title remains in the United States until patent to the State, and where error or fraud appears in the official survey, a new survey may be made which will be binding on the State.

The Congressional Act of 1866 provides that a swamp land return upon the approved township plat is conclusive of the State's rights, and the California Supreme Court held same to be as binding as a patent, but the United States Supreme Court seems to have overturned this decision. In practice it is safe to assume that the State under the original grant obtains an equitable title only that may be defeated for error

in survey or fraud and absolute title passes only by patent to the State.

The State will not issue its patent until the certificate of purchase is surrendered and as the Political Code now reads the patent is issued to the original purchaser, but inures to the benefit of the assignee. The chain of title from patentee to present owner must, of course, appear of record and is often broken, necessitating the procuring of deeds, or assignments and sometimes a suit to quiet title. The State land office records at Sacramento often explain defects in the title. A letter of inquiry to the Surveyor-General usually elicits an answer that clears up deficiencies in the chain of title as shown by the county records.

(End of subject)

U. S. LANDS, HOW CONTROLLED:

Under the Federal Constitution Congress controls disposition of National Territory and has placed same by statute under control of the Secretary of the Interior, whose Land Department is in charge of the Commissioner of the General Land Office. (32 Cyc. 1000.) The land laws are executed by these officials as a special tribunal.

The Registrars and Receivers of local land offices are agents of the Interior Department with ministerial powers and tho authorized to decide certain questions of fact, their decisions are subject to supervision by the Commissioner. The Land Department has power to annul a certificate of purchase at any time before patent has issued, but when a person has complied with all requirements to obtain patent he is vested with a complete equitable estate which he can convey or encumber.

PATENT TO HEIRS OF DECEASED CLAIMANT:

When U. S. patent runs to heirs of deceased entryman after his death the patent inures to said heirs "as if their names had been specially mentioned" under the Pre-emption Act. (See 128 Cal. 150.) This applies also to Homestead Act, Donation Act, Timber Culture Act and Bounty Land Act. (See 2269 Rev. Stat. of U. S.)

It does not apply to Desert Land or Mineral Lands and Mining Act in which the point is covered by Sec. 2448, Revised Stat. of U. S., under which the title inures to heirs, devisees or assigns as if patent had issued to decedent during life. (In re Evans, 235 Fed. Rep. 956.) See also Phillips vs. Carter, 135 Cal. 604 and 170 Cal. 596. Sec. 1724, C. C. P., applies only to cases where the federal law treats a patent to heirs as giving them title as purchasers and not by succession. (See No. 514114.)

When Patent to Heirs of a deceased claimant passes title to such heirs as purchasers and not by succession, the probate court has no jurisdiction over the land, a finding as to who the heirs are is necessary. (128 Cal. 150.)

U. S. HOMESTEAD, SEPARATE PROPERTY:

Passes title to married man, patentee, as his separate property as a donation or gift from U. S. Government, 172a C. C. does not apply. (199 Pac. 1104 and Cal. cases cited.)

FULL PAYMENT GIVES EQUITABLE TITLE:

One who has done everything that is necessary to entitle him to a patent has a complete equitable estate in the land which he can sell or convey, mortgage or lease. (32 Cyc. 1080, 103 Cal. 367.)

It should be noted, however, that Receiver's final receipts now state that purchaser will be entitled to a patent "if all then be found regular." This makes it unsafe to vest such title in the United States "in trust for" the holder of the final receipt as some title companies have formerly done.

APPLICATION GIVES NO RIGHTS TILL PAYMENT:

Until application approved and money paid in, applicant has no interest capable of transfer. (158 Cal. 632.) This affects 3519, Pol. Code, under which patent runs to applicant.

UNIVERSITY LANDS:

For approval of state listings by U. S. Land Office at Washington, D. C., write to Acting Land Agent, University of California, Berkeley.

FOREST RESERVES, LIEU SELECTION, METHOD:

The Act of June 4, 1897, is an invitation to private owners to exchange their lands inside the Forest Reserves for land outside. The General Land Office demands a complete abstract of title, certified to by the County Recorder and also the recordation of a deed to the United States. Recording this deed is merely an offer of conveyance and the deed passes no title until formal delivery by acceptance by the United States. If delivery is refused, no grant by the United States is made, but proof of rejection is found in the local U. S. Land Office. The repealing act of March 3, 1905, withdraws the proposal of exchange. Offers made previous by recording deeds lapse unless already accepted by the Government. (See Roughten v. Knight, 156 Cal. 123.)

The Relief Act of September 22, 1922, does not apply to cases as above after rejection, but only to cases in abeyance.

MEXICAN LAND LAWS ON SECESSION FROM SPAIN:

The Mexican Congress, after the country had thrown off the government of Spain and had erected a new and independent government in its place, representing the sovereign power of the nation, passed the law of 1824, providing for the grant and colonization of the public lands. This law provided that the lands of the nation which were not the property of any individual, corporation or town, were subject to the law and to the right to be colonized; and for this purpose the congress of the states should, with the least delay, enact laws and regulations for colonizing within their respective boundaries, conforming in all respects to the constitutive act, the general constitution, and the rules established by the law of 1824. The law

then prohibited the colonization of any land within twenty leagues bordering on any foreign nation, or within ten leagues of the seacoast, without the consent of the Supreme Government, and further provided that in the distribution of the lands preference was to be given to Mexican citizens, that no person should be allowed to obtain a grant of more than eleven leagues, and that no person who might obtain a grant under the law should retain it if he resided out of the limits of the republic. it was then further provided that the executive should proceed in conformity with the principles established by the law of 1824 to the colonization of the territories of the republic.

The supreme executive government, acting under the foregoing provision, on November 1, 1828, established regulations for the granting and colonization of the public lands in the territories, and among others, in California. These regulations provided that the governors or political chiefs of the territories were authorized to grant vacant lands within their respective territories to either Mexicans or foreigners who might petition for them with the object of cultivation or settlement, and that such grants should be made according to the laws of the general congress of August 18, 1824, and under their qualifications. The regulations then set out a series of preliminary proceedings, specially enjoined for the purpose of ascertaining the fitness of the petitioner to receive a grant, and also of ascertaining if the land asked for might be granted without prejudice to the public or individuals. It was required that every person soliciting land should address to the governor a petition expressing his name, country, and religion, and describing as definitely as possible by means of a map the lands asked for, that the governor should proceed to obtain the necessary information, whether the petition contained the proper conditions required by the law of August 18, 1824, both as regarded the land and the petitioner, in order that the application might be at once attended to, or if it be preferred, that the municipal authority might be consulted whether there was any objection to the making of the grant; that this being done the governor would accede or not to such petition in conformity to the laws on the subject; but that if the grant was made it must be in strict conformity with the laws on the subject, and especially with reference to the law of 1824, that the grants made to individuals or families should not be definitely valid without the previous consent of the departmental assembly; and that the definitive grant asked for being made, a patent signed by the governor should be given to serve as a title to the party interested, wherein it must be stated that the grant was made in exact conformity with the provisions of the law, in virtue of which possession should be given. It was further provided that a record should be made of all petitions and grants in a book kept for that purpose, with maps or plats of the land

granted, and a circumstantial report should be provided quarterly to the Supreme Government. And there were many other stringent provisions and conditions imposed, the system thus established furnishing the highest evidence of the extreme interest the Mexican Government took in guarding against impositions and frauds by or upon the political chiefs in the execution of the law. These were the only laws of the Mexican congress passed on the subject of granting the public lands with the exception of those relating to the missions and towns. While the Mexican constitution of 1824 was in force, and after the passage of the national colonization law of August 18, 1824, the States of the Mexican Confederation possessed the property in the soil, and had alone the power, by direct agency of appropriating lands to individuals, but from and after the adoption of the constitution of 1836 no power to grant lands was vested in the separate states.

Under the laws of Mexico, pueblos or towns, when once established and officially recognized, were entitled, for their benefit and the benefit of their inhabitants, to the use of lands, embracing the site of such pueblos or towns, and of adjoining lands within certain prescribed limits. (6 Wall. 363, 18 Law. Ed. 863.) These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues. (32 Cyc. 1163.)

The issuing of the patent was the last step in the obtaining of a land grant. The U. S. patent became requisite after the cession to the United States of California by the treaty of Guadalupe Hidalgo. (45 Cal. 527, 99 Fed. 618, 90 Cal. 342, 47 Cal. 570.) The United States patent is a quitclaim of all interest. (32 Cal. 1229.)

MEXICAN GRANTS MUST BE PROVED:

Some Mexican grants, apparently valid, were rejected and lost because of failure to present them to the Board of Land Commissioners within the time allowed. The Treaty with Mexico recognized valid Spanish and Mexican land grants. Botiller vs. Dominguez (13 Pac. Rep. 685 in U. S. Sup. Ct. Rep., 32 Law. Ed. 927) ruled that if act of Congress was in conflict with treaty, the act prevailed and no Mexican grant in California was valid unless passed on under Act of 1851 by being presented to land commissioners.

HOMESTEAD AND TIMBER CLAIMS EXEMPT FROM DEBT:

It is expressly provided by statute that no lands acquired under the provisions of the Homestead Law shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, and that no lands acquired under the timber culture laws shall

in any event become liable to the satisfaction of any debt contracted prior to the issuance of the final certificate therefor. (32 Cyc. 1082, 137 Cal. 414, 105 Cal. 214, 47 Cal. 348.)

DRAINED LANDS:

Drainage of inland lakes and lands uncovered claimed by state. State has issued patents but listings must be approved by Washington Land Office. #397709.

ALIENATION OF STATE LANDS:

For statute governing this see Secs. 3395 to 3574, Pol. Code.

TIDE LANDS:

The U. S. Supreme Court in C. and C. of San Francisco v. Le Roy (U. S. Rep. 34 L. Ed. 1101), said:

> "The titles acquired by the United States to lands in California under tide waters, from Mexico, were held in trust for the future state, so that their ownership and right of disposition passed to it upon its admission into the Union. That doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subject to trusts which would require their disposition in some other way."

The Supreme Court of the United States in the case of Weber vs. State Board of Harbor Commissioners, (21 Law. Ed. page 202) said:

> "Although title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to THE PARAMOUNT RIGHT OF NAVIGATION OVER THE WATERS, SO FAR AS SUCH NAVIGATION MIGHT BE REQUIRED BY THE NECESSITIES OF COMMERCE WITH FOREIGN NATIONS OR AMONG THE SEVERAL STATES, THE REGULATION OF WHICH WAS VESTED IN THE GENERAL GOVERNMENT."

As to the trust under which the State of California holds such lands, this is set out very clearly in the case of Forestier v. Johnson (164 Cal. 24-30), as follows:

> "So far as may be necessary for the regulation of interstate and foreign commerce, the United States has the paramount right to control the navigable waters within the several states. The state can make no disposition of the soil beneath or allow any interference with the navigable waters, that will impair this right and power of the United States. The title to the soil beneath such waters, including all that is covered with water at ordinary high tide, as well as lying below low tide, belongs to the respective states by virtue of their sovereignty. 'It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties'."

Another clear decision is that in the case of Ward v. Mulford (32 Cal. 365), in which it is said:

> "The land which the state holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the ordinary tides. Such land is held by the state in trust for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned."

Another case explanatory of the law governing such lands is that of (See the Illinois Central R. R. Co. vs. the People of the State of Illinois and the City of Chicago, U. S. Sup. Ct. Rep. 36 Law. Ed. 1018).

Various enactments of the Legislature have provided the method by which sale could be made of swamp land and tide land. A great many purchases were made under the procedure provided, but the purchasers have in many cases been deprived of their title to tide lands by the State.

The Legislature by enactment dated April 4, 1870, provided as follows:

> "All swamp and overflowed, salt marsh and tide lands within one mile of the state prison of San Quentin; within five miles of the City and County of San Francisco; within five miles of the corporate limits of the City of Oakland; and within two miles of any town or village, are hereby excluded from the provisions of this act; provided that this act shall not be construed to authorize the sale of any land below low tide."

Sale of such lands could therefore be made only as provided by said act.

The town of Wilmington was incorporated by an act of the legislature dated February 20, 1872. A number of the patents issued by the State of California to purchasers of tide lands at Wilmington were declared void by the Supreme Court of this State because said patents violated the provisions of the enactment of 1870 in that they were lands lying in two miles of an incorporated town. The Constitution of the State of California of 1879 provided in Article 15, Section 3, as follows:

> "All tide lands within two miles of any incorporated city or town in this State, and fronting on the waters of any harbor, estuary, bay or inlet used for the purpose of navigation shall be withheld from grant or sale to private persons, partnerships or corporations."

On March 12, 1887, the legislature of the State of California repealed the former act of said legislature incorporating the Town of Wilmington. After said repealing act had been passed certain purchases of lands were made at Wilmington; that is, applications for purchase, and surveys were approved, but before patents were issued the City of San Pedro was incorporated and for that reason the Supreme Court held in People vs. Banning Co. (166 Cal. 35), that Sec. 3, Article 15, of the Constitution of 1879, prohibited said sales, notwithstanding that said lands were not within two miles of any town or city at the time the applications for purchase were made.

Where sales were made and patents issued to lands not prohibited by the provisions of the Constitution, the Supreme Court stated in People vs. California Fish Co. (166 Cal. 576-598) as follows:

> "If any part of the tide land in controversy was open to sale when the sales thereof were made, the proper judgment would be that the defendants claiming under such patents owned the soil, subject to the ease-

ment of the public for the public uses of navigation and commerce, and to the right of the State, as administrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes."

Section 3, Article 15, of the Constitution of the State provides among other things that all tide lands within two miles of any incorporated town or city shall be withheld from grant or sale to private persons, partnerships or corporations. The Supreme Court of this State in the case of Cimpher vs. City of Oakland, 162 Cal. 90, held that this Section of the Constitution did not prohibit the State from granting tide lands to a municipal corporation, and further stated that the word "corporation" as used in said Section was modified by the adjective "private" preceding it. And while said Section prohibited the State from granting to private corporations, it did not prohibit the State from granting tide lands to municipal corporations.

RIGHT TO U. S. OVER FILLED-IN LAND:

Altho an upland owner holds a State grant to adjacent lands formerly under navigable waters, and the U. S. Government has established a bulkhead line and the upland owner has filled in to such line, this line may be moved inshore and the fill removed to that extent by said government in aid of navigation, without liability. (Garrison v. Greenleaf Johnson L. Co., 237 U. S. 25.)

ACCRETION:

Title "by accretion" is acquired to "alluvion" or particles of material deposited by natural causes upon the upland soil so as to attach to and become a part of the land on which they are cast and are the property of the owner thereof. Filled-in land and accretions formed by means of human agency are not in this category and a distinction must be made by the searcher where necessary. The deliberate or sudden deposit of one person's soil upon that of another is termed "avulsion" and no title immediately passes because the true owner can still identify his property. The actual status of lands bordering salt and fresh water should be investigated before passing title to land outside original patent boundaries or where accretion is claimed.

LOST PATENT:

For certified copy of lost or unrecorded patent, write to the Hon. Commissioner of the General Land Office at Washington, D. C., giving description and local Land Office showing and enclose draft for necessary fee.

(End of subject)

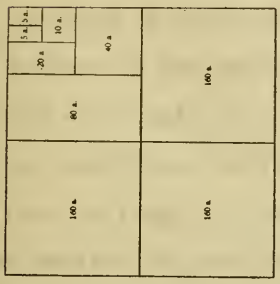
LAND MEASUREMENTS

For the better understanding of land subdivision some data follows:

Map of a government township showing adjoining sections:

36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6
12	7	8	9	10	11	12	7
13	18	17	16	15	14	13	18
24	19	20	21	22	23	24	19
25	30	29	28	27	26	25	30
36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6

Map of a section subdivided into acreage:



A section is 1 mile or 80 chains square, 320 rods or 5280 feet, 640 acres.

A quarter section is half a mile or 40 chains square, 160 rods or 2640 feet, 160 acres.

USEFUL TABLES

7.92 inches = 1 link

25 links = 16-1/2 feet = 1 rod

4 rods or 100 links or 66 feet = 1 chain

80 chains or 320 rods or 8000 links or 5280 feet = 1 mile

1 square rod = 272-1/4 square feet

43,560 sq.feet or 160 sq. rods or 10 sq. chains = 1 acre

1 acre = 208.71 feet square

1 vara = 33 inches = 2-3/4 feet

50 varas = 137-1/2 feet

100 varas = 275 feet

Circumference of a circle equals diameter times 3.1416.

Area of a circle equals the square of the diameter times .7854.

Length of an arc equals number of degrees times .017453 radius.

The degree of a curve is determined by the central angle which is subtended by a chord of 100 feet.

The deflection angle of a curve is the angle formed at any point of same between a tangent and a chord of 100 feet and is half the degree of the curve.

The radius of a 1-degree curve is 5,729.65 feet, or 5,730 feet for practical use. The radius of any curve can be found by dividing this number by the number of degrees of the curve.

To read the length of a course between stations as marked for surveying, subtract the lower from the higher; 12 plus 52 from 17 plus 83 equals 5 plus 31 equal to 531 feet.

If no mention is made that the bearing is magnetic, it is understood to be true.

To change magnetic bearing to true bearing, add the declination if bearing is either Northeast or Southwest, and subtract if it is Northwest or Southeast. The declination is not always given, and should be ascertained.

A searcher should have at hand a small celluloid protractor for measuring angles and for making sketches by mete and bound descriptions when required. Courses in degrees and minutes can be ascertained at once with small trouble.

(End of subject)

RECORDATION

HISTORICAL:

The necessity for a legalized system of preserving the contents of land title documents either by safeguarding the muniments of title themselves, or of transcribing them by recordation, was recognized by ancient civilizations like Egypt and Assyria, and most countries possess such systems today. In England in the reign of Henry VIII, a law was enacted for the protection of innocent purchasers and to prevent fraud that "no conveyance of bargain and sale shall take effect unless it is enrolled in the Courts at Westminster or in the County where the land lies."

Registry laws were enacted in America in the several colonies soon after their settlement. In Massachusetts as early as 1641, a law was passed reciting as its purpose "for avoiding fraudulent conveyances and that every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deal in". Today no prudent person would invest in real estate or obligations secured by real property values without a search of the public records and a certificate or guaranteed evidence of title from a responsible title company.

MARKETABLE TITLE:

Technically there is no such thing as a perfect title. A marketable or merchantable title has been held to be "a title that is fairly deducible from the public records".

The public records not only give notice of their contents, but of all else that would place a prudent man upon inquiry and which he ignores at his peril. Thus (except possibly for the provisions of Section 869 C. C. amended August 17, 1923), a deed to John Smith, Trustee, or "as Trustee", places the searcher upon enquiry as to the nature of the trust. As a trustee only takes sufficient title to carry out the terms of his trust, John Smith may have no title he can transfer to a purchaser and such title as he failed to acquire under the deed to him in trust remains vested in the original grantor.

In handling instruments to be subsequently placed of record, the escrow man must watch carefully that the formalities demanded as a pre-requisite to recordation have been observed. The Recorder is the agent of the party filing the document, and errors or omissions in transcribing are his errors and omissions, for notwithstanding that under Section 1170 C. C. an instrument is deemed to be recorded when it is deposited with the proper officer, the Courts have ruled (131 Cal. 552) that this section must be read with Section 1213 making the instrument constructive notice of its contents only when acknowledged or proved and recorded as prescribed by law, and this cannot take place until the instrument has been transcribed in the proper book. So, if a mortgage safely handed across the counter of the Hall of Records at the close of an escrow, should by error be copied into a book provided for Bills

of Sale or Agreements it would not impart constructive notice of its existence, and the escrow holder cannot feel safe in considering a deal closed when the documents are filed for record. He must follow them across the counter, and see, not only that they get into the proper book, but that the names and initials are not misspelled nor figures transposed.

TITLE BY PATENT:

As to lands derived from the United States it must be remembered that a Patent differs from a deed in that delivery is not necessary to pass title, and title by United States Patent is title by record, because it is provided by Act of Congress that all patents must be recorded before they are issued; this is the final record of the whole transaction of acquiring the land and invests the grantee with the title.

TORRENS SYSTEM:

Registration under acts of the Legislature is either optional or compulsory. In the English dependencies it has usually been made compulsory under what we understand somewhat vaguely as "Torrens Systems", but in all countries where the Torrens systems have met with success, the act of registration is an adjudication by the Registrar of the rights of all persons after an investigation hedged about with all the safeguards and solemnities

of a high Court proceeding, and the act of the Registrar is not administrative, not merely clerical as in America, but is judicial in its nature and effect, and has never contemplated, as with us, that a public official, elected solely to transcribe documents accurately from the original into a copy book, should create titles and vested interests in real property as the ink drops from the end of his pen, construing, as he writes, trusts, powers and estates, without the intervention of Courts or the prohibition of the United States Constitution regarding the taking of property without due process of law.

It has been proved in actual practice that the Torrens registration law in California has failed to realize the promises of its advocates. It is cumbersome, slower than the accepted system of recordation, the certificate of ownership issued is subject to attack by innocent parties in interest not before the court, it is not cheap and is generally in disfavor by investors, banks and those who loan money on real estate. Moreover it has not disqualified our courts of their jurisdiction over either persons or property.

(End of subject)

EVIDENCES OF TITLE

An ABSTRACT OF TITLE is an epitome of the title papers affecting the land covered as shown by the public records, condensed to include only such essentials as are necessary to enable an examiner to trace the chain, pass on its validity, and ascertain all defects, liens and encumbrances affecting the title. It should be arranged chronologically, except possibly as to judgments, taxes and assessments, and concludes with a certificate signed by the party compiling it and stating what records have been searched. It is most important to examine this certificate carefully, for the scope of the search is often limited to the records in the offices of certain named county officials and the opinion of the best attorney is of necessity limited to what the Abstract contains.

A CERTIFICATE OF TITLE is an opinion written after an examination of the records, showing the status of the title with all liens and encumbrances outstanding at its date. In cases of loss caused by an error, negligence must be proved under the act of employment and a money judgment obtained which cannot always be collected. Until lately it outlawed in two years like a grocery bill.

A GUARANTEE OF TITLE is in effect a policy of insurance of the record title. It is defined in Section 453v C. C. and the word "guarantee" can only be used when the

$100,000 assurance fund called for by Section 453t has been deposited with the State Treasurer. This fund protects the owner of the guarantee against loss caused by error. In addition to this those relying on "Guarantees" are further protected by the more substantial financial position of those who have deposited the assurance fund.

An action founded upon a loss or liability under the above methods of showing title must be commenced within two years from discovery of the loss suffered to avoid outlawry.

A POLICY OF TITLE INSURANCE is similar to a guarantee, but is not confined to the records. It insures the actual title and protects the insured against loss or damage suffered by reason of any misstatements or guarantee made as to the title.

It covers and guards against forgery, false personation, fraud, instruments executed by minors or incompetents, invalid trusts, the community rights of husband and wife, the claims of undisclosed heirs and all such risks. It is backed by the deposits required by law to be made with the State Treasurer, and by the stock and assets of the issuing Title Company, whose transactions, moreover, are under the supervision of the State Insurance Commissioner.

(End of subject)

ACKNOWLEDGMENTS

DEFINED

An acknowledgment is a formal declaration before a duly authorized officer by a person who has executed an instrument that such execution is his act and deed.

REASON FOR

An acknowledgment is requisite to enable an instrument (with certain specific exceptions) to be recorded and impart constructive notice of its contents and to entitle the instrument to be used as evidence without further proof. (168 Cal. 269.)

WHAT MAY BE ACKNOWLEDGED

Every private writing, except last wills and testaments, may be acknowledged, and the certificate of acknowledgment is prima facie evidence of the execution of the writing. (1948 C. C. P.)

LAW GOVERNING

The acknowledgment must be in accordance with the law of the place where the property is situated as the law stood when the acknowledgment was made.

LAW REVIEWED

The Statute governing acknowledgments has been frequently amended and changed, especially as to married women. A brief review may prove useful:

From January 1, 1873, to July 1, 1891, the certificate of acknowledgment of a married woman must set forth (in addition to the essentials of the general form) that upon an examination without the hearing of her husband, she was made acquainted with the contents of the instrument and thereupon acknowledged that she executed the same, and that she does not wish to retract such execution. (Sec. 1191, C. C.)

Prior to January 1, 1873, it was her acknowledgment only that must be separate and apart from and without the hearing of her husband, not including being made acquainted

with the contents of the instruments.

On and after July 1, 1891, the general form of acknowledgment by the wife is sufficient; prior thereto the special form with separate examination was imperative. The deed of a married woman was invalid without an acknowledgment up to March 14, 1895. (See Loupe v. Smith, 123 Cal. 491.)

CURATIVE ACT

The Curative Act (so-called) cures all defects in the certificates of acknowledgment of instruments (including deeds by married women after July 1, 1891), recorded previous to January 1, 1921. The instrument imparts notice notwithstanding any defect, omission or informality in the execution or acknowledgment or the absence of any certificate of acknowledgment. (1207 C. C.) This is final as to instruments of record for 15 years; until such period has elapsed it must be shown in any action where the record is relied on that the original instrument was genuine.

The Curative Act is a remedial enactment for the benefit of subsequent purchasers and encumbrancers, so if title under a deed improperly acknowledged has not passed, or is not passing under the search in hand, to a third party, it is well to call for a proper acknowledgment. It is the custom of title companies to accept the Act liberally.

Section 1933, C. C. P., defines "execution" as the subscribing and delivering of an instrument, but the absence of a signature would seemingly bring it within the Statute of Frauds.

The Curative Act does not apply to instruments affecting the Homestead, which must be acknowledged by the parties personally and cannot be proven by witness. (1242 C. C.) An attorney in fact or a subscribing witness can neither execute nor acknowledge such instruments. (102 Cal. 202.)

THE THREE ESSENTIALS

The California form of acknowledgment for an individual calls for three principal essentials:

(1) That the party making the acknowledgment appeared in person before the officer.

(2) That he was "personally known" to the officer to

be the person executing.

(3) That he acknowledged the execution of the instrument.

HOW CORRECTED

An acknowledgment cannot be corrected after delivery of the instrument except by a court of equity. (1202 C. C. and see 59 Cal. 507.) Where an instrument is found recorded with a faulty acknowledgment it is not sufficient for the notary to correct and initial the original acknowledgment and re-record the instrument, unless the transaction is covered by the Curative Act. A new acknowledgment should be called for.

IS MINISTERIAL, NOT JUDICIAL

The taking of an acknowledgment is a ministerial and not a judicial act. An officer of a corporation which is a party to the instrument may take the acknowledgment if not personally interested himself. (167 Cal. 392.)

The cashier of a bank took the acknowledgment of the mortgagor in a mortgage running to the bank as mortgagee. It was held that his duties as a notary were distinct from his duties as an official of the bank. (See Bank v. Oberhaus, 125 Cal. 320.)

So, too, the acknowledgment of one of several grantors before another of the grantors acting in his notarial capacity was held to be good in Greve v. Echo Oil Co. (8 Cal. App. 275, 284), because he took no beneficial interest under the deed.

The reasoning above does not apply to an acknowledgment taken by the grantee. He is interested in the transfer; an acknowledgment taken by him is void and the deed is not entitled to record.

The acknowledgment by one of several grantors has been held good as to all but the one who took his own acknowledgment in 8 Cal. App. 284, 99 Cal. 39, and 120 Cal. 311.

AGREEMENT OF SALE

If acknowledged by vendor alone, imparts good record notice (166 Cal. 426; 29 C. A. D. 162; 34 Cal. App. 184). If by vendee alone, it is not good constructive notice and successor to vendor is not bound by it (Keese v. Beardsley, 65 Cal. 165; 213 Pac. 500).

IRREGULARITIES

ABSENCE OR MISTAKE IN DATE

Corpus Juris Vol. 1, Sec. 160, states: "While it is usual and proper for the certificate to state the day and year when the acknowledgment was taken, accuracy in this respect is not regarded as essential; and if the certificate is sufficient in other respects, it will not be invalidated by a mistake in the date, or even by the entire want of a date, as in such case the true date of the acknowledgment may be shown by parol. It is sufficient that such date appears by evidence within the instrument itself, and in the absence of proof to the contrary it will be presumed that the acknowledgment was taken on the date of the execution of the instrument, or at least before the recordation thereof. The date of the certificate is prima facie evidence that the instrument was acknowledged on that day, and when the certificate and the deed bear the same date it is not to be supposed, in the absence of proof, that the acknowledgment was in fact taken before the deed was executed. Where the date of the deed is subsequent to that of the acknowledgment, the latter date may be taken as the true date of the deed."

NAME OF NOTARY OMITTED

Where the official character of the officer is stated in the body of the certificate it need not appear in the subscription, and on the other hand, it is sufficient if the title of the officer be suffixed to the signature, although his official character be not given in the body of the certificate. It has also been held sufficient that the seal of the officer, affixed to the certificate, showed his official character. (Corp. Jur. Vol. 1, page 833, Sec. 168.) (See also decision in 150 Cal. 520, p. 534, as to substantial compliance with the statutory requirements.)

SEAL

Where a form of seal is prescribed it must be substantially followed. Statutory requirements have been held to be directory and substantial compliance is all that is required. (Corpus Juris.) The Notary must keep an official seal on which must be engraved the arms of the State, the name of the county for which he is commissioned and the words "Notary Public". (794 Pol. Code.)

SIGNATURE BY MARK

Signatures by mark require the names of two witnesses to entitle an instrument to be acknowledged and recorded if executed subsequent to June 30, 1903. (C. C. 14.)

VENUE

The venue must be given in all cases to show that the acknowledgment was made within the territorial jurisdiction of the official. (135 Cal. 173.)

BEFORE JUSTICE OF PEACE

A Justice of the Peace cannot take an acknowledgment outside of his own county and the venue must be shown. If the instrument is to be recorded in another county a certificate by the Clerk of the county in which he is acting must be added. (135 Cal. 173.)

BEFORE RECORDER

The Recorder of the Recorder's Court in cities of the Fifth and Sixth class may take acknowledgments within his own jurisdiction. (See Municipal Corpns. Act, Sec. 807 and 883.)

BEFORE POLICE COURT JUDGE

The Judge of a Police Court may take acknowledgments within his jurisdiction. (179 C. C. P.)

BEFORE MILITARY OFFICER

Military officers as designated by the Federal Act of August 29, 1916, Art. 114, are authorized to exercise the general powers of a Notary Public, or of a United States consul in taking acknowledgments of persons subject to the military law, but only in foreign places where the army may be serving.

PROOF OF EXECUTION

Provision is made for the absence of personal acknowledgment by proof of execution and of handwriting. A certificate of proof of the execution of an instrument by a subscribing witness must set forth that the subscribing wit-

ness is personally known to the certifying officer to be the person whose name is subscribed to the instrument as a witness. The subscribing witness must prove that the person whose name is subscribed in the instrument is personally known to him, that such party executed it and that the witness subscribed his name thereto as a witness. (Secs. 1196 and 1197 C. C.) When the proof of execution is established by proof of the handwriting under Sec. 1198 C. C., the witness proving handwriting must swear that he knew both the party who executed the deed and the subscribing witness, and that the signatures of both are genuine. The certificate must set forth also other matters required by said Section 1198 of the Civil Code.

FOREIGN ACKNOWLEDGMENT

When a deed is acknowledged outside the State and is not in accordance with the statute, the certificate of the clerk of a court of record of the county where taken must be attached, showing that acknowledgment is in accordance with the laws of the State in which it is taken and that the officer taking the same is authorized thereto. (1189 C. C.)

NOTARY PUBLIC

WHO MAY BE

A notary must be of age, a citizen, male or female, and a resident of the county for which the commission is sought, for six months prior to appointment. He must give an official bond in the sum of $5,000.00 approved by a judge of the Superior Court of his county and file his oath.

The notary's fees are fixed by statute. His activities are confined to the county for which he is commissioned and his term of office is four years. On termination of office, by death or otherwise, his records and public papers must within thirty days be delivered to the County Clerk, who must deliver them to his successor.

CANNOT ACT AFTER HIS TERM

A notary public cannot legally take an acknowledgment after his four-year term has expired. Such acknowledgments are void and of no effect. (152 Cal. 317; 107 Cal. 236.)

RESPONSIBILITY

The notary is criminally responsible under Sec. 167

of the Penal Code for falsifying his certificates and with his bondsmen is liable for damages for neglect or misconduct. Under our laws the certification of acknowledgment is a solemn act which even the notary himself, for reasons of public policy, cannot controvert.

The notary is expressly forbidden to take the acknowledgment unless he knows that the person making the acknowledgment is the person described in the instrument.

The courts have held that it is not enough that the person who signs and executes be introduced to the notary by a responsible party, because if that were sufficient there would be no purpose in requiring the oath, for such a person could always furnish the introduction.

"Whom I am satisfied" is not the same as "personally known to me", and is not compliance with code requirement. (Kimball vs. Semple, 25 Cal. 446.)

If a person who appears before a notary is not personally known to him, the notary should issue his certificate on the oath of a credible witness and not upon personal knowledge. Failing which, the notary takes the acknowledgment at his own risk. Personal knowledge is not acquired through introduction by another. (See Anderson v. Aronsohn, Supreme Court, Sept., 1923.)

A forged instrument may possibly be acknowledged without liability to the notary. He does not guarantee that the party who signed is the person he claims to be or that the name used is his true name. He was known to the notary by the name he signed, which has been held to be sufficient.

The reputation of the notary for care and accuracy is usually a safe guide in handling instruments deposited with title companies.

FORMS PRESCRIBED BY THE CIVIL CODE

General form for individuals. (Sec. 1189.)

STATE OF CALIFORNIA)
COUNTY OF.....) ss

On this.....day of....., in the year.....
....., before me (here insert the name and quality of officer), personally appeared....., known to me (or proven to me on the oath of.....) to be the person whose name is subscribed to the within instrument and acknowledged to me that he (or they) executed the same.

Form for married women prior to July 1, 1891. (Sec. 1191.)

STATE OF CALIFORNIA)
COUNTY OF.....) ss

On this.....day of....., in the year.....
....., before me (here insert the name and quality of officer), personally appeared....., known to me (or proven to me on the oath of.....) to be the person whose name is subscribed to the within instrument, described as a married woman, and upon examination without the hearing of her husband, I made her acquainted with the contents of the instrument and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

Form for attorney in fact. (Sec. 1192.)

STATE OF CALIFORNIA)
COUNTY OF.....) ss

On this.....day of....., in the year.....
....., before me (here insert the name and quality of officer), personally appeared....., known to me (or proven to me on the oath of.....) to be the person whose name is subscribed to the within instrument as attorney in fact of....., and acknowledged to me that he subscribed the name of..... thereto as principal and his own as attorney in fact.

Form for corporation. (Sec. 1190.)

STATE OF CALIFORNIA)
COUNTY OF.....) ss

On this.....day of....., in the year.....
....., before me (here insert the name and quality of officer), personally appeared....., known to me (or proven to me on the oath of.....) to be the President (or the Secretary) of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

Note: Where the instrument is executed on behalf of the corporation other than by the President or Secretary, insert the words "known to me to be the person who executed the within instrument on behalf of the corporation therein named."

The President or Secretary of a corporation must acknowledge "that such corporation executed" the instrument.

(Sec. 1185 C. C., Statutes of 1905, page 603.) The personal acknowledgment of the President or Secretary is not good. (Sec. 1190 C. C.) And the officer must certify that such President or Secretary is personally known to him to be the President or Secretary of the corporation. (Statutes 1905, page 603.)

Form for corporation acting as attorney in fact for individual.

STATE OF CALIFORNIA)
COUNTY OF.....) ss

On this.....day of....., A. D. 192....., before me,....., a Notary Public in and for said .....County and State, residing therein, duly commissioned and sworn, personally appeared....., known to me to be the.....President, and....., known to me to be the.....Secretary of....., the corporation whose name is subscribed to the within instrument, as the attorney in fact of....., known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged that they subscribed the name of.....thereto as principal, and the name of said corporation as attorney in fact.

Acknowledgment by corporation as attorney in fact for another corporation.

STATE OF CALIFORNIA)
COUNTY OF.....) ss

On this.....day of....., 192....., before me (insert name and quality of officer), personally appeared ....., known to me to be the.....President, and....., known to me to be the.....Secretary of....., the corporation that executed the within and foregoing instrument, as the attorney in fact of..... ....., a corporation, and known to me to be the corporation whose name is subscribed to the within instrument as the attorney in fact of said....., and acknowledged to me that they subscribed the name of said..... thereto as principal, and the name of..... as attorney in fact, and that said..... executed the same as such attorney in fact.

(End of subject)

ALIENS

The first ALIEN LAND ACT became effective August 10, 1913, and does not affect the right of aliens in property acquired prior to that date. It provides that aliens eligible to citizenship may acquire, transmit or inherit lands to the same extent as citizens. Aliens not eligible to citizenship may deal in land to the extent only as allowed by treaty between the United States and the alien's native country and may lease lands for agricultural purposes for a period not exceeding three years.

The Act places in the same position as an ineligible alien, any company, association or corporation, domestic or foreign, in which a majority of the issued capital stock is owned by such aliens.

Property falling to ineligible aliens by devise or inheritance must be sold and turned into cash before distribution.

Property taken in violation of the Act is held subject to escheat to the State after proceedings instituted by the attorney-general. Any leasehold or interest less than the fee acquired in violation of the Act is also subject to escheat and sale as provided.

The treaty with Japan referred to in the Act provides that "the citizens or subjects of the contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale or retail, to own

or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease lands for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects".

The second ALIEN LAND ACT was an initiative measure voted on affirmatively November 2, 1920. It became effective December 9, 1920. It provides that aliens not eligible to citizenship may acquire, possess and transfer real property as allowed by existing treaties between other countries and the United States and not otherwise. This applies to corporations in which a majority of members are aliens or majority of stock is owned by aliens.

Ineligible aliens may acquire stock in any association, company or corporation authorized to own agricultural land to the extent prescribed by treaty but not otherwise. No such alien or alien corporation may be appointed guardian of the estate of a minor consisting of property which ineligible aliens or alien corporations are prohibited from acquiring. The public administrator or other competent person or corporation may be appointed as such guardian. Sec. 5 governs action of any "trustee" (agent, guardian, attorney-in-fact) holding title for an alien, compels filing of an annual report with property, collections, contracts, etc., set out, with heavy penalty for violation.

Property falling to such aliens by succession or thru probate proceedings must be sold. Escheat is provided

for by legal process. No such alien or corporation can hold possession longer than two years of land acquired in satisfaction of a mortgage or lien. Provision is made to cover evasion, disguised transactions and the legislature may amend the act to further its purpose or facilitate its operation.

The Amendment of 1923 (Stat. 1923, p. 1020) provides that no ineligible alien may be appointed guardian of any part of a minor's estate which such alien is prohibited to acquire. Trustees holding property must file reports with Secretary of State. Agricultural land acquired by foreclosure may be held for two years. Leasehold or interest less than fee, including cropping contracts, which are declared to be "an interest", escheat to State as of date of acquirement. The Court shall adjudge the value of the "interest" and enter judgment for amount for the State, which remains a lien from acquisition. Property shall be sold thereupon. Presumption of evasion arises when purchase money is paid by an ineligible alien and title taken by any other person, or if a mortgagee is given possession when a mortgage runs to such alien.

The United States Supreme Court has recently decided four cases sustaining the power of the States under existing treaties with Japan, to prohibit Japanese subjects from leasing agricultural land, from owning stock in a corporation authorized to acquire such land and from making cropping contracts for cultivating the same.

(a) Terrace v. Thompson (1923), 263 U. S. 197, sustained the State of Washington law which confines the prohibition against the leasing of agricultural lands to aliens who have not in good faith declared their intention to become citizens. This, though differing from the language of the California laws, includes Japanese not born in the United States. The Court interpreted the treaty with Japan and found that it conferred no privilege of leasing agricultural land, though it did confer the liberty "to lease land for residential and commercial purposes". It ruled that each State, in the absence of treaty provision to the contrary, may enact laws prohibiting aliens from owning land within its borders; the right to own or lease land for other specified purposes impliedly negatives the right to own or lease land for purposes not enumerated.

(b) Porterfield v. Webb (1923), 263 U. S. 225, sustained the California law affecting aliens ineligible to citizenship in regard to agricultural leases.

(c) Frick v. Webb (1923), 263 U. S. 326. Here the Court decided that the right to carry on trade given by the treaty does not give the privilege to acquire stock in an agricultural corporation because such requirement would be inconsistent with the intention and purpose of the parties to the treaty.

(d) Webb v. O'Brien (1923), 263 U. S. 313. This involved the validity (under the Act of 1920) of what are known as "cropping contracts", under which the ineligible

alien agreed to take his remuneration out of the profits upon sale of what he produced. The California Supreme Court in the Okahara case (216 Pac. 614) held that a cropping contract did not amount to an interest in the land as forbidden to ineligible aliens by the act. The District Court held similarly in 1921 in O'Brien v. Webb (279 Fed. 117). In the present case the United States Supreme Court reversed the court below and decided that the cropping contract was not a privilege granted by the treaty. This case was decided November 19, 1923, but already the California Act of 1920 had been amended by the Act of 1923 which expressly forbids cropping contracts, and in Section 8 provides for the forfeiture of any interest in real property less than the fee "including cropping contracts which are hereby declared to be an interest in real property".

The Supreme Court in the Terrace case defined eligible aliens as "free white persons and persons of African nativity or descent. Generally speaking, the natives of European countries are eligibles; Japanese, Chinese and Malays are not". It is questionable whether any Asiatic is eligible as a citizen.

HAWAIIAN JAPANESE

Citizens of the Hawaiian Republic on August 12, 1898, became on annexation citizens of the United States. (Vol. 3 Fed. Stat. Am., p. 491.) Prior thereto the constitution of the Hawaiian Republic provided (Art. 17) that

"all persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens". (11 Hawaiian Rep. 166.) The certificate of the Secretary of the Territory "as to Hawaiian birth" is legal determination of facts stated under Act No. 79 H. T. 1907. These certificates should be supported by evidence that the Japanese has not renounced his citizenship by obtaining proof of residence, voting, marriage, or other data.

The U. S. Immigration Commissioner sometime ago issued an order not to recognize birth certificates issued by the Hawaiian Territorial authorities. The Secretary of the Territory who issues these is appointed by the President, the Senate concurring, and is a Federal official. Altho such certificates are prima facie evidence of citizenship, they should be validated by independent investigation in every case. This is the method the Immigration officials themselves adopt, but they retain the evidence of proof in their own possession and the claimant does not always have a copy of it.

ALIENS MAY LOAN MONEY

The Acts do not prohibit a Japanese subject or ineligible alien from loaning money secured by mortgage upon real estate, but upon foreclosure and sale he could not buy and acquire title that he could hold untainted by escheat for longer than two years.

TITLE PASSES BY DEED TO ALIEN

A deed to an ineligible alien passes the legal title but is subject to all the provisions of the Act at the date of the transfer as to escheat, penalties and prohibition, while the Act of 1923 provides for escheat attaching as of date of acquirement. This may be construed to mean that if the ineligible alien should later deed to a citizen the escheat provision follows the transfer and is not remitted.

ESCHEAT UNDER WASHINGTON ALIEN ACT

Deed to an alien forbidden to own land is subject to escheat. See Case of Abrams vs. State in 9 L. R. A. N. S. 186. A Washington decision where alien law is held constitutional and which decided:

One deeding land to alien incapable of taking it, retains no interest therein even if such deed is forbidden.

Failure of State to take proceedings in lifetime of such alien prevents escheat as against aliens capable of taking title.

Deed from such alien to one capable of owning bars forfeiture by State.

The Washington State statute is not as drastic as our present California alien land law, under which the penalty of escheat attaches at the date of acquirement, so that the above ruling as to deed from the alien passing a good title cannot be held to apply.

TREATMENT OF ALIEN INSTRUMENTS

So as not to work a hardship on those of the alien races who are in fact citizens, by bona fide naturalization or birth, it is customary to call for such proof as will enable a title company to safely accept conveyances to or from such persons as sufficient.

It is not safe to accept the so-called "landing certificate", for this is not binding against the Federal Government if used by the wrong person misrepresenting himself or if used a second time by a person denied admission. The register of voters may help or a certificate of birth and the records of the Chinese Y. M. C. A. are usually accurate. No flat rule can be laid down, but the motto should be "Safety First" and the utmost care taken in the matter of identity and proof before passing any deed or instrument naming an apparent alien as a party. Any such transaction occurring in a search should be submitted to the company's legal counsel for opinion and decision.

Where deeds to citizens of Chinese, Japanese or alien race are sent in to be recorded or are handled in escrow a recital should be called for to be inserted after the name of the grantee giving his nationality, age, marital status, domicile, citizenship and such data as may serve to identify him.

EVASIVE GUISE

People vs. Cockrill, known as the Akada case (41 C. A. D. 86, April 30, 1923), found defendant guilty of con-

spiracy. Akada, a Jap, bought land for his American-born minors from Souza, who deeded title to Cockrill, Akada's attorney. Akada took possession and raised crops. Trial court found both guilty. Appellate Court sustained judgment and upheld. Sec. 9 of Alien Act.

JAPANESE SOLDIERS INELIGIBLE

A Japanese subject enlisted in the United States Army and was honorably discharged at Honolulu in 1919. The United States District Court, upon the terms of the Federal act allowing citizenship to aliens who fought in the war, admitted him as a citizen. The California Supreme Court upheld the State constitutional amendments and denied citizenship. (See case of Ichize Sato, July, 1923.) The Federal Court decision rendered at Boston, July, 1923, decided that the act of Congress granting the right of naturalization to aliens serving in United States forces during the war does not apply to Japanese, as they are not free white persons or of African nativity or descent.

CHILD OF UNITED STATES PARENTS BORN ABROAD

Section 1993, U. S. Revised Statutes, declares children born out of the United States whose fathers at that date are citizens are themselves citizens, but these rights do not descend to the children whose fathers never resided in the United States. (84 Pac. 114.)

HINDU AS CITIZEN

A Hindu is not a "free white person" and as such

eligible to citizenship (U. S. v. Bhagat Singh Thind, 261 U. S. Rep. 204 of Feb. 19, 1923). The defendant, a high caste Hindu of full Indian blood, was granted citizenship by the U. S. District Court for Oregon as of Caucasian descent. The U. S. Supreme Court decided that the words "Free white persons" used in Revised Statutes #2169 are words of common speech synonymous with "Caucasians" only as that word is popularly understood and not according to its scientific derivation and terminology. They must be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken. While "Caucasian" and "White person" were treated as synonymous in the Ozawa case (260 U. S. 178), they are not of identical meaning.

HOMESTEAD OF ALIEN

A Chinese alien acquired land legally prior to 1910. After the Alien Land Act of August 10, 1913, he declared a homestead on it and subsequently died. The court decided that the homesteaded property would pass to and title vest in his widow, but she would hold subject to the provisions of the act. (In re Lamb, 95 Cal. 397-407. See also an old decision in 23 Cal. 109.)

ALIEN POLL TAX LAW

Constitutional amendment voted on November 2, 1920. Effective December 9, 1920. Male aliens between 21 and 60 years must pay an annual poll tax. This was fixed at $10.00 with compulsory registration of aliens.

It is apparently in conflict with the treaty with Japan.

NATURALIZATION

The Cable bill, approved at Washington September 22, 1922, changes rights as to citizenship radically by providing separate citizenship for married women. Its salient points are:

(a) An alien woman married to a citizen or to a man who hereafter becomes naturalized does not thereby acquire citizenship. She must go thru the same procedure as a male alien except that no antecedent declaration of intention is necessary and the necessity of residence is reduced from five to one year.

(b) A woman citizen who marries an alien (except an ineligible alien) does not lose citizenship without a formal renunciation unless she resides during marriage two years continuously in the country of which her husband is a subject or five years continuously outside the United States. An American woman marrying an ineligible alien ceases to be a citizen of the United States.

(c) A woman who has lost her citizenship by marriage can regain it by acquiring citizenship as above.

SOME EXAMPLES

A Chinaman was born in the United States and is a citizen. He made trips to China, where he married a native Chinese woman and had children there. Later on he brought his son to the United States. The son is a citizen from

birth. (Sec. 1993, Vol. 2, Fed. Stat. An.) The same son brought over a Chinese woman and married her. The wife being incapable of citizenship does not take citizenship by her marriage. (Sec. 1994 Idem.) A deed to these two as joint tenants would not pass a good title so far as the wife is concerned.

LEASE TO ALIEN CORPORATION

Business property was leased for 99 years to a corporation composed of Japanese stockholders and the Title Company was asked to insure the leasehold estate. It was refused on the ground that the lease is not permissible under the Alien Act of 1923 in that it doesn't come in under the treaty allowing a lease to citizens or subjects of the signatories. The reasons were as follows:

Words and Phrases, Vol. 7, p. 6706, cites The Pizarro, 15 U. S. (2 Wheat) 227, 245, 4 L. Ed. 226, where "subjects" in a treaty was construed as "citizens or inhabitants".

A person domiciled in a country is a subject of that country. U. S. vs. Sam Chong (U. S.), 47 Fed 878, 885. The U. S. Supreme Court has held that a corporation is not a citizen. The question is settled. Paul vs. Virginia, 8 Wall. (U. S.) 168, 10 L. Ed. 357. In re Eberle, 98 Fed. 295, and Orient Insurance Company vs. Daggs, 172 U. S. 557, 43 L. Ed. 552. A corporation therefore has no right "to own or lease houses, manufactories, warehouses or shops" or to "lease land for residential and commercial purposes" though a citizen or subject of Japan can do so under the treaty.

Under the Alien Act a corporation, the majority of stockholders being ineligible aliens, may take only under the treaty and not otherwise. Where the treaty is silent, a corporation cannot acquire. Under Sec. 7 of the Act any leasehold or interest less than the fee, wrongfully acquired, shall escheat to the State. Secs. 8 and 9 of Act deal with conspiracy to evade escheat and punishment therefor.

In view of the fact that ineligible aliens are attempting to obtain control of land by methods not specifically forbidden by the Act, the above concrete example may provide interesting information.

JAPANESE IN UNITED STATES

A recent estimate (1924) disclosed the following figures:

Japanese in Washington State, 17,000, cultivating 20,500 acres under lease. No Japanese own any land, as the law forbids it. In Oregon 224 Japanese are cultivating 10,000 acres. In California two per cent of the population are Japanese or approximately 68,000. About 458,000 acres of farm lands are being cultivated by Japanese who own outright 27,000 acres. Corporations of American and Japanese stockholders own 47,781 acres. Land leased to Japanese amounts to 192,150 acres; cultivated under crop-sharing contract, 191,000 acres; cultivated under labor contract, 70,137 acres.

ALIEN PROPERTY CUSTODIAN

This official is appointed under the "Trading with the Enemy" Act, approved Oct. 6, 1917. Notice of seizure of the property of alien enemies is found recorded under which the property seized passes into the possession and control of the custodian. Local agents are appointed by him, usually a trust company. The deed by the custodian is made without any warranty, is practically a quitclaim of interest and right and should be carefully handled. Especially is it advisable to see that the consideration is received by the custodian. The alien owner can then claim his exemption of $10,000 against the money only and not in the property itself.

(End of subject)

BANKRUPTCY

PURPOSE OF BANKRUPTCY LAW:

(a) To distribute the assets of the bankrupt pro-rata among his creditors.

(b) To give to the bankrupt immunity from his debts, so that he may do business again unhampered by previous indebtedness.

FEDERAL AND STATE LAW:

The Federal Bankruptcy Act of July 1, 1898, suspends the State Insolvency Act, while the Federal Act is in force. (112 Fed. Rep. 323.) In so far as it is in conflict with the State Law. (136 Cal. 279.) The first legislation in this State on insolvency was the Statute of 1852, amended in 1858, 1860, 1863 and supplemented 1875-6, and continued in force by Sec. 19, Pol. Code. It was repealed by the Insolvency Law of 1880, which latter was amended in 1891 and 1893 and was repealed by the Act of 1895. (Act 392, Hennings Gen. Laws.)

PROCEDURE:

Bankruptcy proceedings are commenced by filing a petition involuntarily against the bankrupt, or voluntarily by him, in the United States District Court where he has his domicile. The bankrupt must file a schedule of his property showing its character and value, with a list of his creditors and amount due to each, and any securities held by them. Also a claim for any exemption the law allows him. (100 Fed. 262.)

On hearing the petition the court enters an adjudication of bankruptcy or dismisses the petition. (156 Fed. 634.)

EFFECT OF ADJUDICATION:

An adjudication of bankruptcy operates in rem and is a caveat to all the world, having the effect of an attachment and an injunction; it brings the entire estate of the bankrupt, in so far as it is not exempt, into the custody of the law (153 Fed. 98), and appropriates it to the payment of his debts, and where followed by the appointment of a trustee, is constructive notice to everybody, at least within the Federal jurisdiction, of the transfer of title to the bankrupt's property, and such persons must take notice that the ownership of the bankrupt has ceased and become vested in the trustee. (7 C. J. 87.)

TITLE AFTER ADJUDICATION:

After adjudication of bankruptcy the creditors meet

and elect a trustee. Title to all property, wheresoever situate, of the bankrupt becomes vested in the trustee upon his appointment and qualification (7 Cal. App. 248) "as of the date he was adjudged a bankrupt". This affects all property owned at the date of filing the petition. Thereafter the trustee may compel surrender of all assets in whosoever's hands found. (184 U. S. 1) Payment by a debtor between filing petition and date of adjudication binds the trustee (186 Fed. 84).

The Bankruptcy Act provides that if the creditors do not appoint a trustee or trustees the court shall do so. This power of appointment may be exercised by the referee. (7 C. J. 112.)

Title vests in the trustee only for the purposes of administration and distribution among the creditors. (Brand. 746.)

The trustee must abandon to the bankrupt or the lienholders any property that is a burden to the estate and not likely to realize anything for the creditors.

If the trustee disclaims onerous property he cannot thereafter claim its benefits. (17 Am. Bankr. Rep. 391.) Upon abandonment or refusal of title by the trustee, the property revests in the bankrupt. (196 U. S. 115, 159 Fed. Brand. 760.)

The debtor cannot sell, transfer or convey his property while the bankruptcy proceedings are pending. (7 C. J. 91.)

PROPERTY OMITTED FROM SCHEDULE:

Under Sec. 70-A, Sub. 5, of the Bankruptcy Act, the trustee is vested with title to all property of the bankrupt which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. Such property is still within the jurisdiction of the court, the trustee having been discharged and the property not scheduled. Proceedings may be reopened under Section 2, Sub. 8, of the Act and a new trustee appointed under Section 44a.

SALE BY TRUSTEE:

The Bankruptcy Act expressly confers upon courts of bankruptcy power to "cause the estates of bankrupts to be collected, reduced to money and distributed", and in order to effect this it is proper to sell the property of the bankrupt which comes into possession of the trustee. (155 Fed. 838; 205 Fed. 207; 7 C. J. 230.)

Where property of the bankrupt is subject to a mortgage or other encumbrance it may be sold free of liens (185 Fed. 576, 582), without any prior determination either as to

their validity or as to their amount or extent, if there is reasonable ground for believing that more can be realized than the amount of the encumbrance, in which case the proceeds of the sale are held subject to the liens. (7 C. J. 231.)

If it be decreed more for the benefit of the bankrupt estate, encumbered property may be sold subject to the encumbrances. (112 Fed. 958; 7 C. J. 234.)

The Bankruptcy Act provides that "real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 74 percentum of its appraised value". (7 C. J. 237.)

EXEMPT PROPERTY:

The title to property reserved by the State law as the debtor's exemption does not vest in the trustee in bankruptcy, but remains in the debtor, awaiting the mere legal formality of having it appraised and set apart to him. (113 Fed. 766; 7 C. J. 362.)

DISCHARGE:

A bankrupt is entitled to receive a discharge as a matter of right, unless some of the reasons specified by the Bankruptcy Act for refusing discharge are found to exist. One who seeks to avoid his debts under the Bankruptcy Act must comply strictly with its provisions, and if he fails to apply for his discharge within the time limited, his right is lost to him forever. (180 Fed. 957; 7 C. J. 367.)

A bankrupt may apply for a discharge at any time after the expiration of one month from the date of his adjudication and within twelve months subsequent thereto. (157 Fed. 675; 7 C. J. 323.)

A discharge in bankruptcy is conclusive against any future liability of the bankrupt with respect to debts which the statute provides shall be released and as to his right to a discharge. (7 C. J. 395.)

On close of bankruptcy proceedings, the property of the bankrupt undisposed of reverts to him or those entitled to his estate. (7 C. J. 417.)

When bankrupt is discharged, title reverts to him, if property is not disposed of by trustee, but at all times bankrupt has an actual interest which becomes perfect when not needed to pay debts or if trustee is discharged without using it. Trustee takes title for a limited purpose to pay

creditors, and he is trustee for bankrupt of the surplus. Bankrupt can dispose of surplus by deed during pendency of case. (109 Pac. 696.)

Bankrupt has right to residue after debts proved and expenses paid. (25 Mich. 40.)

On close of proceedings property undisposed of reverts to bankrupt. (95 S. W. 637 [Texas].)

Property acquired after adjudication does not pass to the trustee (161 Fed. 815, 7 Cor. Jur. 132); nor does property acquired after filing petition but before adjudication. (192 Fed. 834.)

NO TRUSTEE APPOINTED:

Where a bankrupt filed his petition in bankruptcy, but no trustee was ever appointed, and the estate was administered and the bankrupt discharged without disposition of his land, the title of the bankrupt to the land was never divested. (7 C. J. 417.)

DEBTS NOT RELEASED BY DISCHARGE:

The Federal Act of 1898 provides:

A discharge in bankruptcy shall release a bankrupt from all his debts except such as:

(1) Are due as a tax levied by the United States, the State, County, District or Municipality in which he resides;

(2) Are liable for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) Were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.

Another authority speaks as follows:

"An unsatisfied judgment is a liability, and accordingly the debtor remains liable upon a judgment based upon fraud, false pretenses or false representations. The form of the action is immaterial, and all that is necessary is that the judgment should be based upon actual as distinguished from constructive fraud. It need not appear from the judgment itself that it was based upon fraud, but it is sufficient if this can be gathered from the entire record of the case; but where the judgment recites that the cause of action was based upon an account, the judgment creditor cannot go behind the judgment, and prove that the transaction out of which it arose was fraudulent, so as to avoid the effect of a discharge." (7 C. J. 400.)

And as to a mortgage:

"The lien of a mortgage is not affected by the mortgagor's discharge in bankruptcy, although the discharge will prevent the rendition of any personal judgment for a deficiency on foreclosure." (7 C. J. 411.)

HOMESTEAD AND JUDGMENTS

Judgments docketed, had homestead filed, adjudication, homestead exemption and discharge. The judgments remain a lien. (Smalley v. Langensur, 70 Pac. 786, 196 U. S. 94.)

LIEN OF JUDGMENT

The judgment from the time it is docketed becomes a lien upon all the real property of the judgment debtor not exempt from execution in the County, owned by him at that time, or which he may afterwards acquire until the lien ceases. * * * * (671 C. C. P.)

The lien of the judgment acquired more than four months prior to the filing of the petition in bankruptcy is not affected by the discharge. (American Improvement Co. vs. Lilienthal, 29 Cal. App. Dec. 697; also Oilfields Syndicate vs. American Improvement Co., 256 Fed. 979.)

The Bankruptcy Act provides: That all levies, judgments, attachments, or other liens, obtained thru legal proceedings against a person who is insolvent, at any time with-

in four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, * * * * Section 67f, Bankruptcy Act, 1898.

> "The question whether a judgment against one who is thereafter adjudged a bankrupt is thereby discharged, is properly raised by pleading the discharge in a proceeding to enforce the judgment. Presumably the court in which such discharge is thus pleaded will accord it due legal effect, and if it does not the bankrupt's remedy lies in a review of such action by the proper appellate tribunal, or ultimately in the Federal court for denial to him of a right under a law of the United States."
>
> Hellman v. Goldstone, 161 Fed. 913;
> Boggs v. Dunn, 160 Cal. 283;
> Brandenburg on Bankruptcy, 1573.

The conclusion reached is that the discharge in bankruptcy is personal to the bankrupt and must be pleaded by him if he would have the benefit; that the discharge does not affect the lien of the judgment but that it can be set up to prevent the enforcement of the lien of any judgment not falling within the excepted classes (such as a judgment for alimony).

BANKRUPT IN REGARD TO LIENS:

See case of Cohen v. Nixon & Wright, 236 Fed. 407, in which the court said:

> "Nixon & Wright has no right to exercise the power of sale contained in their security deed after their debtor had gone into bankruptcy without permission of the bankruptcy court. Everyone who takes a mortgage * * * takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for him in his contract."

In re Jersey Island Packing, the court said:

> "It is true that the bankruptcy act provides that liens, such as the lien holders had under the trust deeds in this case, shall not be affected by bankruptcy, but that is

> far from saying that such lien holders may after the commencement of proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them; and this is true whether such a lien is an ordinary mortgage, or deed of trust with provision for a strict foreclosure by a notice and sale. The provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract." (138 Fed. 625.)

Discharge in bankruptcy sufficient to bar judgment rendered during the pendency of the bankruptcy proceedings. (Sec. 758 Loveland, 110 Am. St. Rep. 382; 160 Cal. 283; 159 Cal. 742; 30 L. Ed. Sup. Ct. 985.)

ATTACHMENT:

Attachment levied more than four months prior to filing a petition in bankruptcy, but judgment rendered within the four months, the lien is not rendered void by the bankruptcy proceedings or adjudication, and title passes to the trustee subject to attachment lien. (Sec. 67f Bankruptcy Act of 1898. 187 U. S. 165.)

ADJUDICATION IN OTHER STATES, PROPERTY HERE:

Jurisdiction of court extends all over United States. (229 U. S. 254; 57 L. Ed. 1174.)

A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee, if recorded, would have imparted had not bankruptcy proceedings intervened. (Sec. 21e.)

A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings and of the fact that the order was made. (Sec. 21f.)

A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded, shall impart the same notice that a deed from the trustee to the bankrupt, if recorded, would impart. (Sec. 21g.)

The trustee shall, within thirty days after the

adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real property are recorded in every county where the bankrupt owns real estate not exempt from execution. (Sec. 47c.)

The above is directory only.

PROPERTY OUT OF THE UNITED STATES:

The Bankruptcy Act passes no title to real estate situated in a foreign country, but the Act provides that:

> "The bankrupt shall execute to his trustee, transfer of all of his property in foreign countries."

(End of subject)

COVENANTS, CONDITIONS and RESTRICTIONS

The title man should learn to clearly distinguish between a covenant and a condition. Speaking in general terms, the liability for violation of a covenant results in a question of damages between the covenantor and the covenantee, while the effect of non-fulfillment of a condition works a forfeiture of the estate. It is not always possible to take the words "covenant" and "condition" as indicating which has been created in a conveyance. If the intention of the parties is so clearly expressed as to show that the enjoyment of the estate transferred was intended to depend upon the performance of a certain stipulation, a condition and not a covenant will result, but in case of doubt a covenant is favored rather than a condition. (107 Fed. 798; 79 Am. St. Rep. 750.) And where the matter is in doubt construction by a court will favor the free use of the land. (160 Cal. 257 and 559.)

Conditions are of two kinds, conditions subsequent and conditions precedent.

CONDITIONS SUBSEQUENT are those which refer to the happening of a future event in regard to the estate conveyed and render it liable to be defeated upon breach of the condition imposed (Hawley v. Kafitz, 148 Cal. 393; 1438 C. C.), or where the estate transferred passes at once to the grantee subject to be divested from him upon the happening of some subsequent event.

CONDITIONS PRECEDENT are those which must be performed or take place before the estate set out in the conveyance can vest(1436 C. C.). The title does not pass out of the grantor until the condition on which it is predicated is performed. If the consideration for the conveyance is solely the performance of the condition set out, then it is a condition precedent. An agreement to convey is an instance of this. Where the language is not clear enough to decide the intent of the parties to the deed, courts will favor the creation of a condition subsequent rather than one precedent.

A deed upon the condition that the grantee shall do certain things set out is a personal covenant rather than a condition.

Certain conditions sometimes attempted to be imposed are void. A testamentary devise of land to the decedent's widow on the condition that she shall not remarry is unlawful, but if the devise was conditioned that she should lose the title if she remarried, the law interposes no objection because this would be a grant until she remarried, which is lawful (710 C. C.). Conditions restraining alienation are void (771 C. C.), such as one forbidding the sale of the

land granted without the consent of the grantor (64 Cal. 363) or for a certain named price only (74 Cal. 141). The title passes but the condition is void as a condition subsequent, but if the conveyance is based upon a condition precedent that is impossible of fulfillment, the attempted grant itself is void (98 Cal. 433), such as the performance of a condition that is forbidden by law. If the act to be performed is not wrong of itself but otherwise unlawful, title passes freed from the condition. Thus the grantor might make the condition the erection of a factory upon the land which the law forbade in that locality. The transfer holds good but the condition does not.

IMPLIED COVENANTS:

The use of the word "grant" in a conveyance, unless modified or restrained by other language in the deed, implies that the grantor has not conveyed the same estate to any other person and that it is free from encumbrances, made or suffered by the grantor or by anyone claiming under him (1113 C. C.). These covenants, though not set out in the deed, may be sued on.

COVENANTS REAL OR PERSONAL:

Real covenants are those which run with the land, are based upon mutuality of the benefits to accrue and inure to the use of and bind subsequent grantees.

Personal covenants are binding upon the covenantor and his personal representatives. A covenant merely restricting the use of the land is not a real covenant (136 Cal. 36), but a personal covenant may be enforced in equity against a subsequent grantee with notice if this notice be proved against him.

The searcher in his daily practice is mostly concerned with what are known as "building conditions" such as are contained in deeds for lots in residential subdivisions and which vary in the language by which they are imposed from personal covenants carelessly expressed to real conditions binding the land with penalty of re-entry, forfeiture and reversion of title drawn in the light of recent court decisions and sufficient to effectuate their purpose. Ordinarily the title man may list these in a brief sentence in his exceptions or list of encumbrances and protect his certificate or policy, and the legal construction of the same does not concern him. It may, however, become necessary to eliminate these restrictions to clear the property at times and to that end some knowledge of their effect and the rights of parties interested becomes essential.

SEC. 1460 C. C. PROVIDES:

"Certain covenants contained in grants of estates in real property are appurtenant

> to such estates and pass with them so as to bind the assigns of the covenantee and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to run with the land."

SEC. 1462 C. C. PROVIDES:

> "Every covenant contained in a grant of an estate in real property which is made for the direct benefit of the property or some part of it then in existence runs with the land." (155 Cal. 683.)

Notice that such covenants had to be created in the grant itself. Then in 1905 Sec. 1468 C. C. was adopted, which reads:

> "A covenant made by the owner of the land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels of land."

Then again as to this State the only covenants which run with the land are those specified in the code and those incidental thereto (1561 C. C.).

By the terms of Sec. 1468 C. C. two or more parcels of land may by mutual agreement entered into by the several owners thereof be restricted as to use, occupation, character or cost of improvements to be erected thereon, for the mutual benefit of the parties themselves, their heirs, successors and assigns, so as to create covenants that will run with the land.

It is not necessary to give notice to a subsequent grantee or that reference be made in the deed to him of the covenant. The covenant as originally created is sufficient. (Quatman v. McCray, 128 Cal. 285.)

While formerly considerable doubt existed as to the effect of what are known as tract restrictions imposed by the deeds to individual lots or parcels in a subdivision and the rights of the original owner of the tract and of the successive owners of the lots, we have been helped very materially by the clear-cut decision in the case of Werner v. Graham, rendered by Judge Olney, concurred in by Justices Shaw and Lawlor (181 Cal. 174). This far-reaching decision was upheld

by the Supreme Court in banc on May 15, 1923, in the case of McBride v. Freeman citation which expressed itself as satisfied with the conclusions therein stated as established rules of property. To so many cases where restrictions have been created is the Werner case applicable that it appears well to quote from the syllabus the following:

SERVITUDE IN FAVOR OF ONE PARCEL AND AGAINST ANOTHER--WHEN NOT CREATED:

> "Where the owner of a tract of land sells a portion of it, exacting of the grantee restrictive provisions as to its use, but without a word indicating that the land conveyed is a part of a larger tract, the balance of which grantor still retains, or that the restrictions are intended for the benefit of other lands, or that their benefit is to inure to or pass with other lands, and without any description or designation of what is an essential element of any such servitude as claimed, namely, the land which is to be the dominant tenement, a servitude in favor of one parcel against the other is not created."

CREATION OF MUTUAL EQUITABLE SERVITUDES--RULE--EXCEPTION:

While it is the undoubted rule that when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all others, the rule is not applicable where there is not language in the deeds which refers to a common plan of restrictions or which expresses or in any way indicates an agreement between grantor and grantee that the lot conveyed is taken subject to any such plan.

Applying this rule to everyday practice we should bear in mind where the original owner at subdivision deeds out his lots and in each deed imposes restrictions which are stated in clear language to embrace the whole tract as part of a plan for the improvement and benefit of said tract, each lot owner obtains certain rights against every other owner in the tract in regard to the upholding of the restrictions and restraint upon the violation of the same. The lots to which these rights belong are termed the dominant tenements; the lots against which these rights may be exercised are termed the servient tenements. This applies to all the lots and thus each lot is a dominant tenement and a servient tenement at the same time.

Moreover, the first deed out disclosing the general plan creates the relationship and binds all other lots in the tract. It is not sufficient to post this first deed to the lot only which it conveys. It should be posted to the entire tract with some appropriate notation as to the rights it creates over the other lots because, altho all other lots remain vested in the original subdivider and policies or certificates so show the title, immediately upon its recordation, notice is imparted of the rights obtained by the grantee and his successors in ownership of the lot deeded over the undeeded balance of the tract. The same reasoning would apply to the case of a recorded agreement of sale containing restrictions cast in similar language as to a deed.

Our courts had already decided in several cases (notably in 136 Cal. 36, 160 Cal. 569) that unless the common grantor inserted recitals in his deed indicating that the restrictions should operate in favor of other land owned by him no equitable easement would be presumed to have been created.

In the McBride case plaintiffs sought an injunction to restrain the erection of a building in violation of conditions incorporated in each deed for lots in a tract by the original owner of the tract. The trial court declared for defendants on the ground that no general plan of improvement was indicated in the deeds imposing the restrictions altho all lots may have been similarly restricted. The Appellate Court reversed the judgment and held that the Werner v. Graham case was limited only to the facts of that particular case and upheld the common law theory of "equitable easements" by which courts of equity have extended aid to persons other than those actually named in the covenants as a duty regardless of whether a strictly legal action could be sustained. As already said, the Supreme Court overruled the Appellate Court and sustained the Werner decision, so that we may now rely upon the record showing without the risk of ignoring latent equities.

In the case of Currie v. Title Insurance and Trust Company (212 Pac. 409), it was decided that where the original owner gave a deed reciting it was "made and accepted upon the following conditions subsequent" setting out restrictions and providing for reversion upon violation, since the deeds do not disclose that the lot conveyed was part of a larger tract and that the restrictions were for the benefit of other lands, said restrictions are conditions and not covenants and inure to the benefit of the grantor only. Further note carefully, that contractual obligations do not disappear as the result of a change in circumstances, but may do so thru voluntary transfer of said rights or additional agreements.

This is an instance of a case brought to have the restrictions removed from a lot by quieting title against the common owner of the subdivision who had given deeds to all lots in the tract imposing similar restrictions and because the property had so changed that it had become more valuable for business than for residence purposes. The trial court gave plaintiff his decree. The Appellate Court reversed it and upheld what is declared to be "express conditions subsequent" in the deed which by its language was held to constitute the final understanding of the parties, but, altho all deeds might be in similar terms, the grantee was no party to any general plan in the mind of the grantor and did not give his consent to any interchange of servitudes. Even if the "conditions" should be classed as covenants they must be held to create easements in gross and inure to the grantor, the defendant, and its assigns.

CONCRETE ILLUSTRATIONS

Two examples will show the practical application of the rule.

A deed recites:

> "This deed is given and accepted upon the express agreement of the second party to build upon said premises within six months a dwelling house to cost not less than $1500.00. Said agreement being considered by the parties hereto as part consideration for this conveyance."

This language was held to constitute no more than a personal covenant (Hawley v. Kafitz, 148 Cal. 393, and cases cited).

Another deed contained the words:

> "This conveyance is made upon the following express condition, viz.: that any building to be used as a dwelling house erected upon these premises within two years shall cost not less than $1200.00."

This was held sufficient to support a forfeiture upon a violation in Quatman v. McCray (128 Cal. 285).

A deeds to B upon the agreement that B shall remain as a member of a certain church. B deeds to X with no qualifications in the grant. X takes clear of the personal covenants between A and B.

A conveys to B and makes the deed upon the condition

that B will support A during his lifetime. This is a personal agreement between the parties. Whilst B owns the property he is bound, but if he deeds to a purchaser in good faith and for value, A cannot follow the property but must look to the proceeds. If, in the first instance, A had passed the title "so long as B remains a member of a certain church," and if, in the second instance, A had retained a lien on the land for his consideration, different results would obtain. The language of all such deeds must be carefully watched.

NEGATIVE EASEMENTS:

Deeds for lots in a tract containing restrictive covenants inuring to benefit of adjoining lots burden the lot conveyed and also create easements over adjoining lots which are "real property" interests. Recorded deeds give notice to grantees of later deeds of these easements. In foreclosing a mortgage made before subdivision and covering unsold lots not released, owners of these easements should be made parties defendant or purchaser at foreclosure sale will take subject to the easements. (16 Cal. 580; Stanislaus W. Co. v. Bachman, 152 Cal. 716.)

Miles v. Hollingsworth, 187 Pac. 167, decided that grantee under such deed acquired a negative easement in every other lot in the tract.

A restrictive clause in a deed prohibiting the erection and maintenance of buildings of a certain character on the land conveyed of less value than a specified amount, and providing for a forfeiture of the grantee's interest in the event of a violation thereof, is a condition subsequent, the breach of which will defeat the grantee's title. (L. A. & Arizona Land Co. v. Marr, 62 Cal. Dec. 385.)

REVERTER AND RIGHT OF RE-ENTRY AS PROPERTY:

Is personal property at common law (Tiffany Real Prop. 1 Sec. 137) and contingent right of reversion was held to be not an estate in 113 Cal. 636, and 91 Cal. 146 (C. J. 21 p. 1017). In California reverter is a "contingent future estate" (Pavcovich v. S. P. R. R. Co., 150 Cal. 39), the grantor retains an interest in the land which may be transferred (699 C.C.). A reversion is residue of estate left in grantor or his successors. (768 C. C.)

Grantor in a deed may reserve a right of re-entry on breach of conditions subsequent to his assigns. This right is property capable of passing by will or transfer under Sec. 1046 and 699 C.C. See Johnston v. City of Los Angeles, 54 Cal. Dec. 549, and 176 Cal. 479. (See also as pertinent to this matter 141 Cal. 366, 169 Cal. 465, and 167 Cal. 706.) It can be waived to the extent of a mort-

gage or in favor of a named person (Supreme Court of Georgia, Moss v. Chappell, 54 S. E. 968). A recorded waiver is good notice under 1213 and 1215 C. C.

REVERSIONER ESTOPPED:

Forfeiture upon violation is waived when original grantor deeds adjoining lots with no restrictions (Brown v. Wrightman, 5 Cal. App. 391). The plaintiff's rights were waived by his own acts.

Original owner lost out because he inserted liquor clause to keep a monopoly for himself. (152 Cal. 376.)

SOME DEFINITIONS:

Private Residence Covenant that no building except a "private residence" be erected, prohibits an apartment house, flat or double house or any structure except that for one family only. (30 C. A. D. 604.)

A two-family flat, one above and one below, with a common entry in front and rear, was held to violate the condition forbidding construction of an apartment house in the Virginia case of Elterich v. Leicht (107 S. E. 735).

"Flats" or "Apartment House" includes any building for the use of more than one family. A covenant prohibiting the erection of "any flat or tenement" was held to be made "to prevent the houses from being used by more than one family" in a Missouri case (155 S. W. 861).

Steps are not a substantial part of a house (163 Cal. 503).

RACE CLAUSE IN DEED:

In case of L. A. Investment Co. v. Gary, 58 Cal. Dec. 538, it was decided by the Supreme Court December 11, 1919, that restriction in a deed that no person "other than of Caucasian Race be permitted to occupy said lot" is valid. It is not in restraint of alienation but is in restraint of use only. The Court said "a condition that the property be not sold, leased or rented, to one not of Caucasian birth is clearly a restraint of alienation."

FORMS FOR SETTING UP RESTRICTIONS:

Where lot searched is vested in original tract owner who has made deeds for other lots in the tract disclosing a general plan of improvement.

"Conditions and Restrictions contained in deeds of record conveying other lots

in said subdivision disclosing a general plan for the improvement of said tract."

Where the lot searched and other lots have been conveyed by deeds disclosing a general plan of improvement.

"Conditions and Restrictions contained in the deed from (original subdivider) to ..... dated ..... recorded in Book ..... page ..... of deeds (or official records) and in deeds of record conveying other lots in said subdivision establishing a general plan for the improvement of said tract."

Quite often a date is inserted in the deed for the termination of the restrictions, after which they shall be null and void. A violation during the prescribed period may have occurred. The reversioner does not lose his right to enforce forfeiture in such a case immediately upon the date set for the termination. He has five years in which to bring an action based upon his rights in real property. This liability may be covered by some such exception as:

"Any rights that may have accrued to (creator of reversion) his successors or assigns by reason of any violation of the conditions or restrictions contained in the deed from ..... to ..... recorded in Book ..... page ..... of ..... and enforceable within five years from ..... date of termination of said restrictions."

This form can be adapted to cover any rights of others that have attached, but if the property has never been built on and is vacant, or if the improvements comply with the restrictions imposed, may be omitted entirely.

TO ELIMINATE RESTRICTIONS:

It sometimes becomes necessary or desirable to cancel the restrictions against property by reason of the change from residence to business or industrial possibilities, and then the question arises as to who are the parties from whom deeds must be secured to eliminate restrictions that have not expired. Not infrequently facts not disclosed by the records, such as failure by the neighbors to observe similar restrictions, or the general character of the tract, or breaches by the persons who might enforce the restrictions, exist, which, if known, would warrant one in building according to one's own wishes notwithstanding, but to make a clean record only

two methods are available. One is to bring an action to cancel the restrictions, and the other is to get deeds from all the persons who, under the law, have any interest in the property for the enforcement of the restrictions, and those who have a right to enjoin a breach. Where there is a general plan of subdivision the right usually inures to all the owners in the tract; this right may be found to be limited by the terms of the original deeds to the owners on the same street, or in the same block, or to adjoining owners, or to the owners or their assigns.

FORM FOR TRANSFER OF REVERSIONARY INTEREST:

Form for clause to be added to a deed to pass the said interest from the owner to a third party:

> "The purpose and intention of this deed is to transfer and assign to said ..... all right, title and interest, present or future, vested or contingent in being or in expectancy now owned or hereafter acquired which in the deeds conveying said lots or any of them to the respective parties named therein said ....., did retain or reserve under the provision expressed in said deeds that upon the breach of any of the conditions, restrictions, covenants therein set out, the premises described shall revert to the grantor, his successors and assigns with the right of immediate re-entry."

LAW OF ZONING:

Of late years Zoning Ordinances have been introduced into many Western municipalities and affect the possession and occupation, if not the title, to property. A person buying for business or industrial purposes should know if the property he wishes to purchase is "zoned" against such uses.

DEFINED

Zoning is an exercise of the police power. Under the exercise of this power no compensation is paid for the limitations imposed even if damage can be shown as in condemnation under the power of eminent domain. The object of zoning has been described as the giving of direction and plan to the growth of a city.

POLICE POWER

Includes not only public health, morals and safety

but also, of late years, public convenience. The U. S. Supreme Court held in Noble State Bank v. Haskell (31 Sup. Ct. 186, 1911) that it extended to all great public needs.

The fourteenth amendment does not curtail the police power when properly exercised.

BUILDING OR SET-BACK LINE

A set-back line for the sake of widening a particular street would undoubtedly call for condemnation proceedings but a building line as part of a comprehensive plan affecting all property in a large district is within the police power and has been held not to deny the equal protection of the law to those affected. (Barbier v. Connolly, 113 U. S. 27, 1885). So long as the regulation is not unreasonable and operates uniformly on all persons similarly situated in the same district, there is no deprivation of property without due process of law. (Reinman v. Little Rock, 35 U. S. Sp. Ct. 511, 1914.)

A building line established upon a request of a majority of abutting property owners was held unconstitutional by the U. S. Supreme Court for the reason that power of this kind cannot be vested in any number of property owners. It was not in the interest of the general public comfort or convenience. (67 S. E. 376 Va.)

DIVISION OF CITY INTO DISTRICTS

The ordinance dividing Los Angeles into residential and industrial districts with "residence exceptions" in the residence district, was upheld in Exparte Quong Wo (118 Pac. 714). This and the Montgomery case (125 Pac. 1070), which was sustained by the U. S. Supreme Court, throw most light on zoning power and can be read with profit.

As to ordinances requiring a frontage majority consent to the erection of billboards, see Cusack v. Chicago (108 N. E. 340). This was upheld on final appeal.

Each ordinance must stand upon its own merits as to its legality and avoid being either arbitrary or discriminatory and must be reasonable. The measure of its force is usually to be found in the way it is drafted.

(End of Subject)

CORPORATIONS

DEFINED

A corporation is a person, though not a natural person. (C. C. 14.)

Corporations are either public or private. A public corporation is organized to govern a portion of the State, all others are private. (C. C. 284.)

LAW GOVERNING

Corporations existing before adoption of the Codes in 1872 are not affected by provisions of Civil Code unless they elect to continue their existence under Code provisions as provided by Section 287, C. C. (288 C. C.)

"Act Concerning Corporations" as in effect at time of adoption of the Codes provided that corporations may have perpetual succession unless otherwise stated in the articles of incorporation. (Act approved April 22, 1850.)

By Amendment (Section 179) approved March 7, 1859, and in force at time of adoption of Codes, court order of sale is necessary for religious, benevolent, etc., corporations to sell property. This Section provides procedure to obtain order.

Prior to March 8, 1901, a foreign corporation had only to file a certificate designating a person residing in this State upon whom process might be served.

Bearing on the above see Case "South Yuba W. & M. Co. vs. Delovico G. Rag, 80 Cal. 333" wherein the Court states that there is no provision or authority in the Statute at that time, by which foreign corporations are to file a copy of their Articles of Incorporation.

Subsequent to March 8, 1901, such corporation had to file certified copies of its Articles of Incorporation or charter etc. creating it, duly certified by the Secretary of State or other officer authorized, and duly certified by the Secretary of State of this State, in the office of the County Clerk of this County. (Statutes 1901, page 108 and C. C. 409.)

Subsequent to May 11, 1917, foreign corporations are governed by the corporation license act, and Sections 405, 406, 408, 409 and 410 C.C. are repealed, their provisions being embodied in Section One of said Act.

Under this Amendment foreign corporations must file

certified copies of the Articles, charter, statute or act under which they are organized, with the Secretary of State, and a certified copy thereof must be filed in the office of the County Clerk of the County in which they own real property and where their principal place of business is. This does not affect corporations authorized to do business prior to March 8, 1901.

FILING ARTICLES OF INCORPORATION - DOMESTIC CORPORATIONS

(Prior to July 28, 1921)

Articles of Incorporation should be presented to the County Clerk in triplicate. He files one copy and certifies to the duplicate as being a copy of those filed in his office. The duplicate so certified and the triplicate are sent to the Secretary of State at Sacramento, who keeps one copy and returns the other showing his certificate and State Seal attached. The latter is then filed in the County Clerk's office to complete the records. (C. C. 295 et seq.)

FILING ARTICLES OF INCORPORATION SINCE JULY 28, 1921.

Articles are filed in the office of the Secretary of State first, and thereafter a certified copy thereof shall be filed in the office of the County Clerk of any County in which the corporation owns property. No corporation shall be authorized to transact business until such certified articles are filed with the County Clerk of the County in which the principal place of business is to be transacted. (Sections 296-299, C. C.)

DE FACTO CORPORATIONS

Where persons associate themselves together for religious purposes and attempt to form themselves into a corporation for such purposes, and upward of 16 years in good faith carry on the business for which it was organized or attempted to be organized, they constitute a corporation de facto notwithstanding there were defects in the corporation proceedings, etc. (Los Angeles Holiness Bank vs. Spires et al., 126 Cal. 541.)

A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of power. (First B. Church vs. Branham, 90 Cal. 22).

EXECUTION OF INSTRUMENTS BY CORPORATION

The name of the corporation must be signed and the corporate seal affixed thereto, and be acknowledged accord-

ing to the special form for corporations.

The President is the executive officer and when an instrument is signed by other than the president, there should be embodied in said instrument, or otherwise of record, a resolution authorizing the act.

Where the seal of the corporation is affixed to an instrument purporting to be executed by it, and the signatures of the proper officers are attached and the instrument is proved, courts will presume that the officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority. 52 Cal. 193. (Cited 70 Cal. 146, 77 Cal. 290, 84 Cal. 566, 93 Cal. 314; 94 Cal. 549; 100 Cal. 74).

Secretary of Corporation is proper party to affix corporate seal and party denying execution must prove want of authority to so affix it. (93 Cal. 301.)

Religious corporations equally with others must have a seal.

A deed without corporate seal, purporting to have been executed on behalf of a corporation by its Board of Trustees, is not admissible in evidence without first showing their authority to execute the same. (33 Cal. 11). The recital of such authority in the deed is not evidence of its existence.

Absence of seal or of proof of facts can only be established by resolution in proper book of trustees. (52 Cal. 192).

The misnomer of a corporation grantee in a written instrument will not invalidate it if it appears from the instrument what corporation was intended. (See 357 C.C. and 154 Cal. 119, 93 Cal. 301, 39 Cal. 514).

A foreign corporation must make designation of an agent upon whom service may be made in an action and must file same with the Secretary of State. Prior to July 27, 1917, under 405 C. C. upon default thereof, service could be made upon the Secretary of State. As the law now stands a corporation failing to comply can neither maintain nor defend an action in a State court concerning its property in this State, nor acquire or convey any title thereto. (See Stat. 1921, p. 638). This law was upheld in People vs. Alaska P. S. S. Co. (182 Cal. 206).

An invalid act of the directors cannot be ratified by the stockholders. (62 Pac. 552, 130 Cal. 345). A special meeting without notice is invalid (109 Cal. 1). Power to

borrow money will always be implied unless restricted, but a bond issue can be made only by compliance with the specific code provisions. A stockholders meeting cannot be held out of the State. Under Sec. 362 C.C. a corporation may shorten its existence by amending its articles, even if that results in immediately ending its corporate life. Other methods of dissolution do not prevent this construction of the code. (165 Cal. 19).

Cemetery corporations, like benevolent and religious corporations, must obtain an order of court to sell real property. (615 C.C.)

Colleges and seminaries of learning organized under Sec. 649, C. C., can deed without a court order. Though a church corporation cannot buy property and give a purchase money mortgage back without an order of court, it can purchase subject to a mortgage already a lien on the property.

DEED BY CORPORATION TO ITS OFFICERS

A deed from a corporation by its officers as grantor to one of those officers as grantee, does not make a good record transfer because persons acting in a fiduciary capacity are forbidden to deal with themselves as individuals. The imperfection is cured if the deed is shown to be supported by a resolution of Directors properly passed by a quorum. (97 Cal. 343, 55 Cal. 359, 151 Cal. 728).

PARTITION OF ASSETS ILLEGAL

Sec. 309, C. C. (prior to amendment of July 27, 1917), forbade a division of assets among stockholders except as to corporations organized to deal in real estate which could divide the assets with consent of two-thirds of the stockholders, but the deeds to accomplish this are subject to the debts of the corporation. In Freeman v. Glenn (28 Cal. Apel. 967), the principle was upheld that such partition is forbidden by civil and criminal law.

Under 309 C. C. as amended in 1917, a corporation cannot divide up the assets if a contract of sale is outstanding or any liability unpaid. Supreme Court in Talcott Land Company vs. Hershiser on 1-27-21 in 61 Cal. Dec. 121.

An instrument conveying the assets to a trustee for collection and distribution among the stockholders while valid as to collection of notes due, etc. was held otherwise void in Hedges v. Frank (174 Cal. 552).

Where a corporation deeds its property to an individual to make partition deeds later and dissolves or becomes defunct, said grantee holds the legal title in trust for the stockholders and creditors and a deed from the trustees under Sec. 400, C. C., is necessary to pass a good title.

An agreement between the owners of all the stock to sell the assets and divide the proceeds, violates 309 C. C. (Burne v. Lee, 156 Cal. 221).

CORPORATION LICENSE TAX:

The first corporation license tax act was approved March 20, 1905. It was repealed June 10, 1913, the repeal to take effect June 30, 1914.

The act provided that every domestic corporation and foreign corporations doing business in the State (except educational, religious, scientific and charitable corporations and those not organized for profit) shall pay an annual license tax between the first Monday in July, and the first Monday in August of every year. For failure to pay, domestic corporations forfeited their right to do business in the State. The Secretary of State was required to report to the Governor on the first Monday in October all corporations which have not paid the tax and the Governor shall issue his proclamation declaring forfeiture unless the tax is paid within 60 days.

This tax was not made a lien on real property, but forfeiture must be watched as affecting the right to acquire, hold and convey property.

Under this act there are nine annual lists of forfeitures filed in the County Clerk's office for the years 1905 to 1913 inclusive.

The second CORPORATION LICENSE TAX ACT was enacted and approved May 10, 1915. (Stat. 1915, p. 422.)

This tax also is not a lien on real property. The act provides that every domestic corporation (except educational, scientific and religious corporations, those not organized for profit and those doing solely an interstate business, also public utility, insurance and banking corporations) and foreign corporations doing business in this State shall pay an annual license tax. The first tax was due January 1, 1916. Taxes became delinquent the first Monday in February. The charter of domestic corporations and the right to do business of foreign corporations was forfeited at 6 p. m. on the Saturday next before the first Monday in March for nonpayment. Under this act lists of

forfeitures occurring March 4, 1916, and March 3, 1917, are filed in the County Clerk's office.

The CORPORATION LICENSE TAX ACT OF 1917 (the third act) came into effect May 11, 1917. It covers the calendar year from January 1st to December 31st, the first tax being due January 1, 1918, and is payable in one sum.

This tax is a lien upon all property owned by a corporation on January 1st each year and remains a lien until paid. If not paid by 6 p. m. on the first Monday in February, it becomes delinquent and $10.00 penalty is added.

At 6 p. m. on Saturday next before the first Monday in March each year if the tax is unpaid the corporate powers of domestic corporations are SUSPENDED (not forfeited as heretofore) and foreign corporations forfeit their right to do business in the State.

The exercise of corporate powers is declared ineffective for any purpose upon suspension except to execute deeds in fulfillment of prior contracts (note the difference between this and franchise tax delinquency) and to defend actions in court.

The following corporations are exempt from this tax:

Educational, religious, scientific, charitable, those not organized or conducted for profit, foreign corporations doing solely interstate business and corporations which are taxed under constitutional amendment No. 1, which includes public utility, insurance and banking corporations (but not incorporated water companies).

Building and Loan Associations are subject to both license and franchise taxes.

Section 1 of this act sets out the method by which a foreign corporation may do business in California, and provides that a corporation failing to comply can neither maintain or defend any action in the state courts nor acquire or convey any legal title to real property within the State.

Foreign corporations not complying with California laws can neither "acquire nor convey" title to land. Upheld in People vs. Alaska P. S. Co., 182 Cal. 206. Statute was amended in 1923 (Stat. 1923, p. 1036), removing this prohibition, but a deed from a corporation not so complying would not give a good record title. Contra Reed vs. Todd, 25 So. Dak. 421, 127 N. W. 527. In Fritts vs. Palmer, 132 U. S. 282 (33 L. Ed. 317) Supreme Court decided that if the Legislature has intended that "No title should pass under a conveyance" that intention would have been clearly manifested.

Deeds to or from foreign corporations should not be passed as good until it has been ascertained that such corporations are in good standing under the act, and also in state of organization.

Under the amendments of 1921 (Stat. 1921, p.640) a fine is imposed for noncompliance and contracts by foreign corporations are declared void but enforceable against them.

The license tax is payable to the Secretary of State and is measured by the capitalization of the company.

RIGHT TO ACQUIRE OR CONVEY

Under similar laws in other states it has been held that a deed to a foreign corporation doing business in the state conveys good title subject only to the right of the state to attack same. Hanna vs. Kelsey R. Co., 37 L. R. A. (N. S.) 355. See, also, Reed vs. Todd (25 So. Dak. 421), 127 N. W. 527. In Fritts vs. Palmer, 132 U. S. 282 (33 L. Ed. 317), the Supreme Court decided that if the legislature had intended that "no title should pass under a conveyance" that intention would have been clearly manifested.

The State, but not an individual, may raise the question as to whether or not a corporation is exceeding its authority (14 Cal. 543, 22 Cal. 621).

CORPORATION FRANCHISE TAX

This tax is levied by the State Board of Equalization and is payable to the State Controller.

The first franchise tax act enacted was approved April 1, 1911 (Stat. 1911, p. 530). It covers the property of a corporation and its franchise which includes the right to be a corporation and to do business.

This tax is a lien on all property owned by a corporation on the first Monday in March of each year and covers the fiscal year thereafter from July 1st to the following June 30th.

The tax is all payable on the 1st Monday in July and the first half becomes delinquent six Mondays later carrying a penalty of 15% if unpaid.

The second half is payable without penalty up to the first Monday in February when 5% penalty is added to all unpaid amounts.

If unpaid in full on Saturday before the first Monday in March domestic corporations forfeit their charters and foreign corporations their right to do business in the State.

Under this act the following lists of forfeitures are filed in the County Clerk's office:

1911	forfeiture	occurred	Mar. 2, 1912
1912	"	"	Mar. 1, 1913
1913	"	"	Feb. 28, 1914
1914	"	"	Feb. 27, 1915
1915	"	"	Mar. 4, 1916
1916	"	"	Mar. 4, 1917

AS AMENDED IN 1917

The amendment became effective May 11, 1917. (See Sec. 3664 et seq., Pol. Code.)

This amendment brings the act in harmony with the Corporation License Act changing the penalty for nonpayment to SUSPENSION of corporate powers as to domestic corporations with the sole exception that they may defend an action in court. The right of foreign corporations to do intrastate business is forfeited.

There is no specific exemption in the Franchise Tax Act as to church property, but the State Board of Equalization has omitted to tax the franchises of churches because such institutions are usually exempted from taxation under general State laws.

REVIVOR OF CORPORATIONS

Revivors for license tax forfeitures prior to 1909 are invalid. The Act of 1905 made provision for reinstatement, but at that time the State Constitution, Article XII, Section 7, forbade the legislature to remit the forfeiture of a corporation charter, but in face of this the special session of 1906 enacted that a defunct corporation could pay back taxes and thereupon be relieved from the forfeiture.

The provision was unconstitutional, and to remedy this the general election of November 3, 1908, amended the Constitution in this respect so that the prohibition of revival only extended to any quasi-public corporation (Mulford Co. vs. Curry, 163 Cal. 276).

The legislature then in 1909 passed a new permission for corporations to pay up and be relieved from forfeiture which was approved March 19, 1909, and it therefore follows that revivals prior to that date are invalid as

being prohibited by the State Constitution. (See 155 Cal. 638, 156 Cal. 93 and 156 Cal. 101.)

Upon repealing this act the reinstatement of defunct corporations was provided for.

The License Tax Act of 1917, Section 12, provides that upon payment of all taxes, the State Controller shall issue a certificate evidencing payment and restoration, which when recorded in any County Recorder's office shall constitute a release of all existing tax liens upon the property of the corporation. County Recorder to keep an index of same. On presentation of said certificate of revivor to any County Clerk, said officer shall make a record thereof in his office in a book kept for such purpose, which record is evidence of the restoration, unless a fresh suspension of corporate powers has occurred since issuing said revivor.

The franchise tax as amended in 1917 provides for a certificate of revivor similar to the above. Recording in any County Recorder's office constitutes a release of all taxes upon the property of the corporation, and the County Recorder must keep an index of said certificates. The same provision as to presentation to any County Clerk is provided as in the case of the license tax. See Section 3669c, Pol. Code.

The words "DO NOT RECORD" on the back of certificate of revivor are simply an instruction to the Recorder not to copy into the record the section of the Political Code printed on the back of the certificate for the guidance of persons interested, nothing more.

The Amendment of 1919, in effect July 22, 1920, as to the franchise tax amends Section 3669c of Pol. Code and provides for revivor by paying all taxes in arrears as formerly, together with a sum equal to the last assessment for each year to time of revivor. Both license and franchise taxes to date must be paid.

When suit has been commenced to enforce payment, costs on filing papers accrue, $7.00. When service is made of complaint and summons add $1.00. These amounts are added to taxes and penalties on revivor and on dismissing suit the $7.00 is turned over to the County Clerk and the $1.00 into a special fund kept by the Attorney General. No special receipt is issued for this $8.00 on revivor.

When it becomes necessary to revive a corporation if suspension is for franchise tax only, write to the State Controller. If it is on account of license only or of both franchise and license, write to the Secretary of State for amounts payable to effect the reinstatement, asking for the

necessary forms for affidavit and application. These must be signed and returned with amounts due as called for. Check should be made payable to the State Treasurer, sent to the Controller with letter of explanation, and asking for certificate of revivor.

No provision seems to have been made for the revivor of a delinquent public utility corporation, nor is any decision available covering the question.

SUSPENSION OR FORFEITURE

One is suspended animation, the other is death. (Ramsore v. Sup. Ct., 205 Pac. 446.)

It is especially necessary to remember the date, May 11, 1917, when the present License Act came into effect and the Franchise Tax Law was brought into line with it. Prior to that date corporations in default became defunct. Title vested in the stockholders as tenants in common and under Sec. 400, C. C., the directors last in office became managers of the affairs of the corporation with full power to settle the same as trustees for the creditors and stockholders. (Rossi v. Caire, 52 Cal. Dec. 701, and Aalwyns v. Martin, 159 Pac. 158; also 101 Cal. 135, 22 Cal. App. 271, 156 Cal. 221, and 173 Cal. 25.)

After May 11, 1917, the corporation maintained its legal existence, but its powers (with the exceptions noted) are entirely suspended. There are no trustees to represent it, its officers have their hands tied and can perform no official act on behalf of the corporation under disability.

REVIVOR

Restores old corporation to its former property rights that it had prior to its dissolution. Is not a new corporate existence. (Talcott Land Company v. Hershiser, 61 Cal. Dec. 121.)

DEED TO DEFUNCT CORPORATION

No title passes when corporation is defunct, as there is no grantee capable of taking title. (150 Cal. 575; 166 Cal. 322; 130 Cal. 27.)

No title passes immediately when corporation is suspended because there is nobody who can accept delivery on behalf of the grantee. If the corporation is revived the deed can be recorded (or rerecorded if already filed) with presumption of delivery. (Ransome v. Court, 63 Cal. Dec. 346.)

DEED BY DEFUNCT CORPORATION:

Deed executed in name of corporation after forfeiture or dissolution and of record for five years has same effect as if executed prior thereto. (Stats. 1921, p. 574.)

This legislative attempt to give life to a deed void ab initio is of doubtful validity and should not be relied on in practice by title men.

A deed made by a domestic corporation after forfeiture is void if made as a corporate act and revivor does not make the deed good, except where, under the License Act, it is made pursuant to a contract antedating the forfeiture. (166 Cal. 557, 160 Cal. 644, 141 Pac. 566.)

Where sale was made and consideration passed prior to forfeiture it is not necessary to obtain any order of court to authorize a deed by the trustees.

ALL TRUSTEES MUST ACT:

The powers of directors of a defunct corporation as trustees must be exercised by united action of all of them. (60 Cal. Dec. 79.)

IDENTITY OF TRUSTEES:

Prior to July 29, 1921, a court had no jurisdiction to determine who were the directors of a defunct corporation to act as trustees under 400 C. C. (101 Cal. 135, 85 Cal. 380.)

On said date Sec. 402 was added to the Civil Code which provides a short court proceeding for such determination.

Appointment of trustees other than the directors last in office requires an independent proceeding. (29 Cal. App. 451.)

SERVICE ON DEFUNCT CORPORATION:

Under 400, C. C., all trustees must be served and any vacancy must be filled by court appointment. (191 Pac. 539.) There could be no binding adjudication on the property unless all trustees were before the court. (180 Cal. 275.)

RELIEF FROM LIEN WITHOUT REVIVOR:

The State Controller holds this is of doubtful effect,

but U. S. Webb, Attorney-General, on Sept. 30, 1919, rendered his opinion that taxes constituted a lien until paid on property sold for payment thereof under 3668c, Pol. Code, and Section 10 of the License Act made taxes a lien "until paid" and that payment of amount due will therefore remove the lien.

DISSOLUTION, STATUTORY:

Jurisdiction to decree dissolution must appear on face of the record because it is acquired solely under the statute and is unknown in common law or equity. Thus the License Tax Act of 1917 declares that no court has jurisdiction to decree dissolution until all taxes due under the act have been paid. The court must therefore make a finding to this effect. (66 Cal. 374, 34 C. A. D. 534, 131 Cal. 109, 145 Cal. 54.) A corporation on "forfeited list" cannot apply for dissolution until revived. (205 Pac. 446.)

DISSOLUTION, TRUSTEES' POWERS:

When a decree is rendered for dissolution, the court has exhausted its authority. It cannot in same action appoint trustees or receiver. Trustees take their power under 400 C. C. (See Havemeyer Case, 84 Cal. 327.) Trustees cannot distribute the assets to stockholders, for title vests in them on dissolution subject to statutory powers of trustees. Trustees might execute instrument reciting dissolution, that affairs are settled, recite names of stockholders and stock owned by each and deliver possession to them pro rata.

ANNUITY GRANT:

Charitable, religious, benevolent, educational corporations or institutions, in active operation ten years, when authorized by insurance commissioner may receive grants of property conditioned on paying annuity to grantor or his designee. (594½, Pol. Code Amdt. 1919, p. 823.)

RELIGIOUS CORPORATIONS, MUST HAVE ORDER TO SELL:

When holding in trust for their missions are nowhere exempted from requirements of 598, C. C. Such corporations must obtain order of court to effect valid sale. (Giffen v. Christ's Church, 191 Pac. 718.)

RELIGIOUS CORPORATIONS, CAN LEASE:

No transaction is valid except under 598, C. C. (191

Pac. 718), which allows "aliening". "Alienation" includes an oil lease (Eldred vs. Okmulgee, 98 Pac. 929). See, also, 183 Pac. 470, and 181 Cal. 680.

A lease is an encumbrance (6 Cal. App. 646).

UNINCORPORATED BENEVOLENT OR FRATERNAL SOCIETIES:

May operate without incorporating under Act No. 4208, approved April 24, 1911 (see General Laws). They may purchase, sell, mortgage and manage real or other property necessary for the objects of the association subject to its regulations, but all conveyances must be executed by the presiding officer and recording secretary under seal after resolution duly adopted.

STATE REGULATION OF NATIONAL BANKS:

In the case of State of California vs. Anglo and London Paris National Bank it was sought to escheat to the State certain money deposited 20 years ago and not withdrawn. It was contended that the State had no power to regulate national banks. The District Court of Appeal held that the escheat inured to the State and not the United States. (Dec., 1920.)

WAR FINANCE CORPORATION ACT:

Approved April 5, 1918, created a corporation with capital of half a billion to advance to banks and others to assist war industries, under control of a "Capital Issues Committee" of 7 members, 3 being members of Federal Reserve Board, empowered to investigate and determine whether it is compatible with national interest that any issue of securities shall be offered for sale when in excess of $100,000.

BANKS, CONSOLIDATION:

Articles of incorporation and consolidation with approval of superintendent of banks and confirmation by stockholders must be filed with Secretary of State, and then with County Clerk. (Stats. 1921, p. 181.)

FOREIGN CORPORATION AS TRUSTEE UNDER WILL:

In re Estate of Wollings (66 Cal. Dec. 641, Dec. 11, 1923) The Michigan Trust Co., a foreign corporation, was denied distribution of the estate as trustee with full power over real estate in California, because it would then be doing business under Sec. 7 of the Bank Act. Under our Constitution a foreign corporation cannot do business here under more favorable terms than a domestic corporation.

(End of Subject.)

DEEDS

DEFINED:

Common law defines "a deed" as a writing sealed and delivered by the parties, and "a conveyance" as a deed which passes title to land from one person to another.

TRANSFER:

"Transfer" is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another. (1039, C. C.)

GRANT:

A transfer in writing is called a grant or conveyance or bill of sale. (1053, C. C.)

STATUTORY FORM OF GRANT:

The statutory (or short form of grant) runs:

"I, A. B. grant to C. D. all that real property situate
(Insert description.)
Witness my hand this ..... day of .....
19....."

This is sufficient in form to pass the title. (1092, C. C.)

IMPLIED COVENANTS:

The use of the word "grant" in a deed implies that the grantor has not already conveyed to any other person and that the estate conveyed is free of encumbrances made or suffered by the grantor (1113, C. C.). Good conveyancing calls for the inclusion in a deed of the encumbrances subject to which the transfer is made.

SEAL UNNECESSARY:

All distinctions between sealed and unsealed instruments are abolished. (1629, C. C.)

CONSIDERATION PRESUMED:

A written instrument is presumptive evidence of a consideration. (1614, C. C.) "A good and sufficient consideration for a written contract" is presumed also under 1963, C. C.

INCIDENTS INCLUDED:

The transfer of a thing also transfers all its incidents unless expressly excepted. (1084 C. C.)

DEED CARRIES STREET AFTER VACATION:

Reference to map reads same into deed to indicate intention of parties as to property granted and if map shows no vacation, street is presumed to exist for purposes of deed. (See Anderson vs. Citizens Savings & Trust Co. Decision 3-28-21.)

DEED OF LEASED LANDS CARRIES RENTS:

A deed of land subject to a lease carries the right to collect the rents as an incident to the grant. The grantee is subrogated to the rights of the lessor. (McDonough vs. Starbird, 105 Cal. 15.)

DELIVERY ESSENTIAL:

A grant takes effect only upon its delivery. (1054 C. C.)

DELIVERY PRESUMED:

A grant duly executed is presumed to have been delivered at its date. (1055 C. C.)

DELIVERY MUST BE ABSOLUTE:

A grant cannot be delivered conditionally. Delivery is necessarily absolute and discharged of any condition imposed. (1056 C. C.)

RETURN TO GRANTOR INOPERATIVE:

Redelivering a grant to the grantor, or canceling it, does not operate to retransfer the title. (1058 C. C.)

DELIVERY IN ESCROW:

A grant may be deposited with a third person to be delivered on performance of a condition, and on delivery it will take effect. While in possession of the third person it is called an escrow. (1057 C. C.) See "Escrows."

Deed delivered to a third person with instructions to deliver it to grantor upon death of grantor. Held that

title passes at once to grantee, the grantor retains a life interest and depositary holds as trustee for grantee. (174 Cal. 205.) Inheritance tax law in force at delivery to depositary applies.

One accepting a deed from original grantor with knowledge of the deed in escrow, takes subject to it. (72 Cal. 133.)

Delivery to the third party must be absolute and beyond control by the grantor, and on the second delivery by the escrowee, the deed takes effect as of the date of its original deposit. (1059 C. C.)

DEED TO TAKE EFFECT AT DEATH VOID:

See 167 Cal. 570. The State Appellate Courts have uniformly held that a deed testamentary in character is ineffective to pass title. If a present interest passes, the deed is good even if power to revoke the deed is reserved. (109 Cal. 323.)

PRESUMPTION OF DELIVERY AT DATE:

Although an unrecorded instrument is valid between the parties and those who have actual notice of it, every conveyance of real property (except a lease for less than one year) is void as against a subsequent purchaser or mortgagee acting in good faith and for value whose conveyance is first recorded. (1214, 1217 and 1107 C. C.)

But under the provisions of Sec. 1055, C. C., that a deed is presumed to be delivered at its date, the first dated but subsequently recorded conveyance would take priority. So good faith, innocence of notice and valuable consideration must be proved affirmatively before the first recorded deed can prevail. (Beattie v. Crewdson, 124 Cal. 577. See, also, 96 Cal. 298.) The burden of proof is on the subsequent purchaser. One who purchases real estate is chargeable with notice of any occupant's title thereof (85 Cal. 270), and if he had notice, actual or constructive, before payment of the money, he is not a bona fide purchaser (65 Cal. 163) and must prove he had no notice. (98 Cal. 409.)

RESTRAINT ON ALIENATION:

Conditions restraining alienation, when repugnant to the interest created, are void (711 C. C.).

EXAMPLE:

A deeds to B and states that grantee shall not convey or encumber. The prohibition is void. But A deeds

to B who shall not convey or encumber and on death of B property goes to remainderman. In this case B takes a life estate, but cannot touch the fee. See Estate of Caruthers (161 Cal. 588). Remainder went to A or if he died first then to "the heirs of B". In the latter contingency those heirs (who take as purchasers) take as a class and their identity is to be determined in an equity and not in a probate proceeding. (171 Cal. 637.)

AFTER ACQUIRED TITLE PASSES:

A grant deed passes after acquired title. (1105 C. C.)

A recital in a quitclaim deed that it shall convey all after acquired title is of no effect if grantor had no title when deed was made. (94 Cal. 227.) A quitclaim deed is defeated by an unrecorded grant deed subsequently recorded.

DEED OF ALL PROPERTY OWNED OR AFTER ACQUIRED, NO SPECIFIC DESCRIPTION:

Is valid as to property owned by grantor at its date. (63 Cal. 396.) It does not convey the legal title of after acquired property (Secs. 700, 703, 1045, C. C.), of which the grantor might possibly become the owner. (Bridge v. Kedon, 163 Cal. 493.) But if made for a good consideration it might be enforced in equity as an agreement to convey or as estoppel. (700 C. C.)—an expectancy is not an interest in property. (1045 C. C.)—a possibility cannot be transferred.

NAMES (IRREGULARITIES AND DISCREPANCIES):

If the grantor is properly named in body of deed and in the acknowledgment, the deed is not invalid because he signs by a wrong name. Edward Jones, record owner, deeded but signed as Edmund. Edward Jones acknowledged the execution. Held sufficient in 25 Cal. 76.

A deed from Robert P. McClintock acknowledged the same way, but signed R. Parker McClintock was held good in Texas. The law recognizes but one given name. Therefore, an error in the middle name or its initial, or its entire omission, cannot affect the validity of a deed. (Devlin on Deeds.) So initials may be used in the signature if the deed and the acknowledgment described the grantor correctly. (Idem.)

A deed to "A, administrator of the Estate of B", vests the legal title in "A". The qualification is descriptive only (32 Cal. 203) and his individual deed will pass title. (See, also, 58 Cal. 257.) In actual practice it is

not advisable to follow this rule. The property is equitably an asset of B's estate and both legal and equitable titles should be brought down to a common ownership.

In practice, where a deed is found to William H. Smith, as grantee, do not pass a subsequent deed from W. Henry Smith, or W. H. Smith, unless the acknowledgment proves the identity or an affidavit is procured and recorded. A deed from William Smith is good to pass title acquired by W. Smith, but not vice versa, because William always embraces "W", but the letter "W" may not always stand for William.

DEED TO DEAD PERSON NOT VOID:

In City Bank v. Pland (124 N. W. 1000), it was held that Sheriff's deed to a deceased person passed title to his executor. (See 3 Dev. on Deeds, 267.)

DEED TO ESTATE VOID:

A deed to "Estate of John Smith" is void. There is no grantee capable of taking title. (39 Pac. 130, 13 Cyc. 538.)

GRANTOR NAMED ALSO AS GRANTEE:

A deed from John Smith to John Smith and Mary Smith, his wife, vests the legal title to all in Mary Smith as a person cannot convey to himself and is incapable of taking an estate from himself by deed.

CHANGE OF NAME OF GRANTEE:

Any person in whom title is vested who afterwards from any cause has his name changed must in a subsequent conveyance set forth the name under which title was acquired. The Recorder must index both names. (1096 and 1905 C. C.)

RIGHTS OF CONVICT:

Can make and acknowledge conveyance of property. (675 Penal Code.)

GRANTEE CAPABLE OF TAKING TITLE:

A deed running to "A or B" as grantee is void for uncertainty.

A deed is void unless there is a grantee capable of taking. Where a deed ran to "the community styling itself the German Roman Catholic St. Bonifazious's Church Community", the court held no title passed as the grantee was an unincorporated association of persons, and was not a corporation de facto or de jure. The decision cites a deed to "Hibernia

Company" held void in 25 Cal. 230, as running to a voluntary association without legal existence, a body unknown to the law. Also deed to "W. W. Phelps & Co." as passing legal title to W. W. Phelps alone. A deed being required to be made in writing by statute, the grantee must be sufficiently ascertained by the instrument or it is void. A firm consisting of surnames vests title in the several parties named and if members of a partnership are designated with sufficient certainty under a firm name, they will take, but "Company", "Co." or "Bro." is insufficient. (150 Cal. 435, Rixford vs. Zeigler.) (See, also, 124 Cal. 418.)

A deed running to "J. S. and his heirs" is good if J. S. is living as he has no heirs and there is no one to claim adversely to him. (14 Mich. 215, Reacy vs. Kearsley.) If J. S. was then dead the deed is void as "heirs" is a word of limitation and not purchase and there is no person to take under it. (12 Cal. 363.)

GRANTEES HOLD IN EQUAL MOIETIES:

A deed to A & B conveys each presumptively a half interest each. (35 Cal. 536 and 26 Cal. App. 775.) If either deeds to C an undivided half the record presumption is conclusive; if either deed to C all his right, title and interest, presumptively one-half passes.

DEED TO GRANTEE "AS HIS SEPARATE PROPERTY":

Neither spouse is estopped from showing, as against the other, the true nature of the consideration. (31 Cal. 448.) See, also, 1962 C. C. P. as to "the recital of a consideration".

POSSESSION, PROOF OF DELIVERY:

Possession of a deed by grantee is prima facie evidence of delivery and being a question of fact, nondelivery must be proved against him. (49 Cal. 374.)

GRANTEE INSERTED AFTER EXECUTION:

In the case of Upton vs. Archer, 41 Cal. 85, it was decided:

> "A deed in due form, signed and acknowledged by the grantor, does not become his deed until the name of a grantee is inserted therein and an agent of the grantor cannot insert the name of a grantee in the absence of the grantor unless his authority is in writing."

The Statute of Frauds governs the case. (See 1624 C. C.)

Thus an agent in California sells property here for an Eastern resident who forwards his deed to the escrow with grantee's name left blank. The agent produces a letter from the seller instructing him to write in the name of the purchaser. This is legally permissible.

ALL GRANTORS MUST BE NAMED IN PREMISES:

A deed signed also by persons not mentioned among those enumerated as grantors, is not the deed of those parties. (159 Cal. 610.)

FORGED DEED VOID:

A forged deed is absolutely void (23 Am. St. Rep. 84) even in the hands of an innocent purchaser. It does not divest the purported grantor or invest the grantee with any rights.

DEED IS FINAL UNDERSTANDING OF PARTIES:

All prior negotiations must be taken as merged in the deed, the presumption being that it embraces the whole engagement of the parties. However, separate deeds executed at the same time, relating to the same subject matter, may be construed as one instrument. (88 Cal. 132, 79 Cal. 449.)

IN WHOSE FAVOR CONSTRUED:

A deed is construed most strongly against the grantor and in favor of the grantee, (22 Cal. 224, 159 Cal. 37), except that a reservation in a grant and every grant by a public officer or body to a private party is to be interpreted in favor of the grantor. (1069 C. C.)

ERROR IN DATE:

A deed becomes operative at delivery and not from its date, though the latter is prima facie evidence of the time of its execution. When executed by several persons its date is considered to be that of the execution of the last grantor. See Devlin on Deeds, Sec. 177.

A mortgage may be dated and acknowledged prior to the date of the note. Sec. 3091 et seq. C. C. and 69 Cal. 550, 64 Cal. 489 and 130 Cal. 10 for illustrations.

RECORDING AFTER OFFICE HOURS:

The deposit of an instrument in Recorder's office accepted after office hours is good. (121 Cal. 254.)

EFFECT OF AFFIDAVIT:

See Reeves vs. Roberts, 242 S. W. 956, as to marketable

title. Affidavits may be used to explain defects but not to change them.

Affidavit will not connect Ida M. Smith as grantee with Amy A. Smith grantor, but may show change of name by marriage or marital status of a party. See Lawyer and Banker for Jan., 1923, XVI 1. p. 45.

UNSIGNED INSTRUMENTS:

Are not made valid by curative act. See Sec. 1091, C. C., and 1971, C. C. P., and Devlin on Deeds, 3rd Ed., Vol. 1, Sec. 547b.

SIGNATURE BY MARK:

Signature or subscription includes mark, when the person cannot write, his name being written near it, by a person who writes his own name as a witness.

Subsequent to 1903, two witnesses are necessary to entitle an instrument signed by mark to be recorded (14 C. C.) and the name of the party so signing must be written by one who writes his own name as a witness thereto.

Signature by mark is discussed at length in Estate of Walker (110 Cal. 387). The majority of opinions construe the statute strictly.

In re Guilfoyle, 96 Cal. 598, the testator's name was written in the body of a very short will by one of the witnesses, but was not written at the end of the will adjoining the mark. The Court upheld the will on the ground that the name was written near the mark, although not immediately adjoining it.

The purpose of writing the name near the mark is to show whose name the mark is intended to represent. (Jackson vs. Jackson, 39 N. Y. 163.)

The affixing by the Clerk of the seal of the Court to a form to which is appended his printed name was an adoption of the printed name which for the purpose in hand was sufficient. (Ligard vs. Cal. So. R. R. Co., 76 Cal. 610.)

It seems that the intention of the law is that the witness should write the name and it is doubtful if a printed or typewritten name is within the statute, but see Corpus Juris 18-190, which says they are good.

The names of two persons near the mark are sufficient without qualification. (163 Cal. 290, 125 Pac. 233.)

MARK AS A SIGNATURE:

A good form to satisfy Sec. 14, C. C., is:

Witness to Mark

JOHN DOE
RICHARD ROE

The name of Rex Bacon who cannot write, being written by me.

his
Rex x Bacon
Mark.

JOHN DOE.

AUTHORITIES ON SIGNATURE BY MARK:

As to signature by mark generally, see Estate of Walker, 110 Cal. 387, reported also in 52 Am. St. Rep. 104; 42 Pac. 815, and 30 L. R. A. 460. In re Guilfoyle (96 Cal. 598, 31 Pac. 553), 22 L. R. A. 370 and monographic note. Ex parte Miller (49 Ark. 18, 4 Am. St. Rep. 17). First Natl. Bank vs. Glenn (10 Idaho 224, 77 Pac. 623, 109 Am. St. Rep. 204). Langenbeck v. Louis, 140 Cal. 406. People v. McDaniels (141 Cal. 113). Kennel v. Austin Min. Co. (144 Fed. Rep. 859).

WITNESS DEFINED:

A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit. (1878 C. C. P.)

SWORN STATEMENT:

Every mode of oral statement, under oath or affirmation, is embraced by the word "testify" and every written one in the term "depose". (14 C. C.)

FOREIGN SIGNATURE:

When a deed is signed in Hebrew, German, or other alien characters, it should show a witness opposite signature and state:

Witness to signature of .....
who signs in Hebrew .....

RECORDING FOREIGN INSTRUMENTS:

New Section added to Political Code in effect July 29th, 1921, reads as follows:

4131a: "When an instrument intended for record is executed or certified in whole

or in part in any other language than the English language, recorders are not required to accept such instruments for record; provided, however, that a translation in English of an instrument executed or certified in whole or in part in any other language than the English language may be presented to the judge of a court of record, and upon verification that such translation is a true translation such judge shall duly make certification of such fact under seal of the court, and shall attach such certification to such translation, and shall also attach such certified translation to the original instrument. For such verification and certification a fee of fifty cents shall be paid for each folio contained in such translation. Such attached original instrument and certified translation may be presented to the recorder, and upon payment of the usual fees the recorder shall accept and permanently file the same and shall also record the certified translation. The recording of such certified translation shall give notice and be of same effect as the recording of an original instrument. Certified copies of said recorded translation may be recorded in other counties, with like effect as the recording of the original translation."

STRUCTURES OVER ALLEYS:

The public easement in the alley includes not only the right of ingress and egress, but right to receive light and air, right to maintain unobstructed so that signs may attract trade. (150 Cal. 592.)

ACCEPTANCE OF DEEDS BY POLITICAL CORPORATION:

Sec. 1158, as amended (Stats. 1921, p. 143), provides that grants to a political corporation of real estate or easements for public purposes shall not be accepted for record without the consent of the grantee evidenced by its resolution of acceptance attached to the deed. This applies to deeds to cities, counties, schools and governmental bodies generally.

DEEDS TO SCHOOL DISTRICTS:

The following form has been used to comply with Acts 1921, p. 143, and is acceptable to County Recorders:

"BE IT RESOLVED that ..... District hereby accepts from (grantor) the conveyance of the property described in the

within deed.

.....School District.
By.....
(Date) By....."

Another form reads:

"The Board of Education hereby accepts deed dated.....from .....to..... conveying Lot.....Tract.....
BOARD OF EDUCATION OF THE.....
By.....
Secretary."

Form for Deed from County:

"The County of.....a body corporate and politic of the State of California, in consideration of..... does hereby quitclaim to (balance as usual).

IN WITNESS WHEREOF the said County of.....pursuant to a resolution passed by its Board of Supervisors, has caused this instrument to be executed on its behalf by the Chairman of said Board of Supervisors this.....day of.....19.....
County of.....
By.....
Chairman of its Board of Supervisors."

(Use Corporation form of acknowledgment adapted to suit.)

VETERANS' WELFARE BOARD:

Mr. Stout, who is now Secretary of the Board (vice Robert Smith, resigned), drew attention to the deeds conveying property to the Board, and which should all run as follows:

"Veterans' Welfare Board of the State of California created under the Act of the Legislature of the State of California known as The California Veterans' Welfare Act approved May 30, 1921."

All policies should follow above wording in the vesting and we have been requested to use this form for deeds and vestings for the sake of uniformity.

It is well to ascertain the name of the veteran who is buying the land under contract so that it can be run

for judgments. Section 4295, Pol. Code, exempts a board acting for the State from paying any fee for filing documents for any official service.

No acceptance of a deed to the Board is required.

DEED FOR ROAD:

Easement or Fee? Deed to city with habendum to hold "for the purposes of a public road of said city" was held to pass the fee and not an easement. Appellate Court upheld decision and Supreme Court denied rehearing. (Cooper v. Selig, 191 Pac. 983.) Grant was interpreted in favor of grantee under 1069 C. C. as grantor could have limited it to an easement if so intended.

EASEMENT BY USER:

Taxation of strip used as street does not stop city claiming easement by usage. (Lantz v. City of Los Angeles, 34 Cal. App. 250.)

EASEMENT OR FEE:

"Grant for sole purpose of an alley way to be used in common with owners of adjoining property, all that tract of land, etc." The court construed this as "an express grant of an easement, a right to use and nothing more. (103 Cal. 516.)

EASEMENT ONLY GRANTED:

A direct grant of right of way for a road carried with it only an easement in the land, and where the deed, immediately following the grant, bargain and sale clause and the description contains the declaration of the grantor that "this grant is for the purpose of granting to party of the second part of right-of-way from his premises to the county road," the expressed intention is to limit the interest conveyed to an easement for right-of-way. (Parks v. Gates, 61 Cal. Dec. 767.)

CONTRACT OF SALE NOT A CONVEYANCE:

Contract of purchase is not a conveyance governed by 164 C. C. See Peiser v. Bradbury, 138 Cal. 570.

VENDEE SHOULD PAY VENDOR DIRECT:

Owner gives agreement of sale and later deeds to third party. (Deed was in fact made as security for obligation.) Vendee thereafter made payments to grantee under the deed. Title was lost by foreclosure of outstanding

mortgage. Vendee cannot get his money back, as his contract was with original vendor, not the above grantee. (See Lewis v. Crenshaw, 5/28/20 in 191 Pac. 72.)

DEED FOR UNDIVIDED ACREAGE:

A deed for a certain number of undivided acres in a block is good. (83 Cal. 56.)

WILD DEED NOT A CLOUD:

If it has no connection with the chain of title, constitutes no cloud or encumbrance. A trust deed by a stranger to the title and overlapping upon the property was held to be no lien and to impart no notice in Bothin v. California Title Insurance Company (153 Cal. 718). Title companies do not usually ignore such deeds. A searcher should be on his guard and make sufficient inquiry to protect him. Such instruments should always be posted to the property account and be included in the chain.

DEED OR WILL:

An instrument is testamentary only when the grantor intended it should not be operative till his death. If a present interest passes, tho' only an interest in a future estate and subject to defeat, it is a present conveyance and not a will. (167 Cal. 570; 109 Cal. 323.)

RIGHT TO CONVEY RESERVED IN DEED:

Grantor in his deed may reserve right to sell and reconvey to any person and deed imparts notice of same. (167 Cal. 570.)

DEED FOR SUPPORT AND MAINTENANCE:

A parent deeds her home to her son reciting that the grantee in consideration thereof is to pay her $20.00 per month or to give her board and lodging while she lives. This is not in the nature of a mortgage because there is no antecedent debt in existence. No vendor's lien is reserved as there is no definite purchase price. Such a covenant was construed in Womble v. Womble (14 Cal. App. 739) to be personal only and a purchaser from the grantee would take clear of any charge thereunder.

LIFE ESTATE ONLY:

Anson deeds to Martha, but grantee shall not transfer or encumber and on her death property goes to remaindermen. This is a life estate with power to deal with same, but not with the fee. See Estate of Caruthers, 161 Cal. 588. Remainder goes to Anson or if he dies first then to "the heirs

of Martha". These heirs in such case take as a class to be determined in equity, not probate. (171 Cal. 637.)

VESTING IN REPRESENTATIVES:

Deed from A to B "for life and at our death to our legal heirs and representatives" vests a life estate in B and at his death share and share alike to the lawful heirs of A and B. This is governed by 1334 C. C. and see decisions: "Legal representatives" means heirs and widow. (53 Conn. 261, 13 Phila. 318, 83 Conn. 342, also 148 Pac. 545 and 120 Pac. 429.)

VENDEE IN DEFAULT CANNOT RECOVER IMPROVEMENTS:

A vendee under a contract of sale is not entitled to recover the value of his own improvements, after he has defaulted in his obligations. (Wilson v. Smith, 45 C. A. D. 402.)

"CONVEYANCE" INCLUDES MORTGAGE:

The word "Conveyance" as used in the code includes a mortgage and instruments affecting title. (1215 C. C.)

DEEDS

DESCRIPTION

GENERAL RULES:

The purpose of the description in a deed is to identify the land to be conveyed and the purpose of the construction of the same is to ascertain the true intent of the language used. If the description is not sufficiently definite to enable the land to be identified, then it is void for uncertainty. (30 Cal. 430, 41 Cal. 263.) But if, taken as a whole, in spite of errors and inconsistencies, the subject of the grant can be ascertained, the deed will not be void, great liberality being allowed by the courts in the construction of the language to uphold the intent of the parties to the conveyance. (169 Cal. 157.)

Where the description is false in some details, but sufficient description is left after rejecting the false parts, the deed is effective.

DEFINITE RULES OF CONSTRUCTION:

When the construction is doubtful and there are no other sufficient circumstances to determine it, the following are the rules for construing the description in a conveyance (2077 C. C. P.):

(1) Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

(2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

(3) Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

(4) When a road or stream of water not navigable is the boundary, the rights of the grantor carry to the middle of the road or the thread of the stream unless it is held under another title.

(5) When tide-water is the boundary, the rights of the grantor to ordinary high-water mark are

included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance.

(6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

REFERENCE TO MAP OR ANOTHER DEED:

The description may refer to another deed or to a map, and the deed or map referred to is considered as incorporated in the deed itself (24 Cal. 444, 50 Cal. 429 and 450).

TWO DESCRIPTIONS OF SAME LAND:

Where two descriptions of the same premises are given and they conflict, effect must be given to the one which is most definite and which will carry out the evident intention of the parties.

A detailed description will control a general one, but if the general description is accurate and the detailed description is uncertain, the general description will be accepted. Thus if a deed contains a mete and bound description which fails to close and a general description designating the lot or tract to be conveyed, the particular description will be rejected and the general one taken.

Where a deed contains two descriptions, one covering land owned by the grantor and the other land he does not own, the former may be accepted and the other rejected.

EFFECT OF STATING ACREAGE:

A description often is followed with a statement that the land described contains so many acres. Unless there is an express covenant that the acreage stated is the land mentioned, the clause as to quantity is considered simply as a part of the description and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries (12 Cal. 148). But the language used in the description may be such that it is evident that the parties intended the deed to convey only a specific quantity of land and in such case no more will pass (2 Devlin, pars. 1044-5).

GOVERNMENT SURVEYS:

The official surveys of the public lands of the United

States are controlling. So the description and plat of the original government survey, made by the Surveyor-General from the field notes, and filed in the General Land Office, are conclusive; and the section lines and corners as laid down in the description and plat are binding upon the general government and upon all persons concerned.

The location of a township upon the public domain is where the government surveyor has actually lined it out, and is to be determined by the monuments placed by him in the field (134 Cal. 136) and the true corner of a government subdivision is where the United States surveyor established it, whether this location is right or wrong. (32 Cyc. 801.)

RECOGNIZED BOUNDARIES:

Where it is proved that a line has been agreed upon either expressly or by long acquiescence as the dividing line between two tracts of land, the courts will not disturb that line (48 Cal. 395, 66 Cal. 218, 76 Cal. 476).

AGREEMENT FOR LOCATION OF BOUNDARY:

Where coterminous land owners, being uncertain of the true position of their common boundary line, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location as it may appear by subsequent measurements. (Price vs. De Reyes, 161 Cal. 484.)

DESCRIPTION IN HABENDUM:

The "habendum" clause in a deed may modify or explain the grant, but cannot enlarge it. If the habendum clause should contain other property not in the grant no title passes for any such additional property.

REFERENCE TO POINTS OF COMPASS:

Unless qualified by reference to fixed monuments the word "Northerly" means due North and so with the other cardinal points as construed by court decisions of long standing. A misunderstanding of this may vitiate a description, as the following illustration will show.

Take a square parcel of land 100 feet on each side, the 4 angles of which face the 4 cardinal points of the compass and the southwest line fronts on Main Street, known as

Lot 1. The owner wants to convey the southeasterly half. His description reads "Commencing 50 feet southerly from the westerly corner of Lot 1, thence easterly 100 feet, and so on. His beginning point is due south of said west corner in the street and the tract described mostly entirely outside Lot 1. If he has used the same description but tied each course to the lines of the lot these would have constituted monuments and controlled his courses.

TITLE TO STREET CENTER:

An owner of land bounded by a road or street is presumed to own to the center of the way. But the contrary may be shown. (831 C. C.)

A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant. (1112 C. C.)

See also the rules for construing descriptions under Sec. 2077, C. C. P., hereinbefore referred to.

When an owner of land subdivides it into lots with dedicated streets and makes a deed of a lot by its designated number, the grantee takes title to the center of the adjoining street or streets, subject, however, to the public use of that part of the property within the lines of the street. His land is burdened with an easement against it to that extent. He does not take the part in the street as appurtenant to his lot because land cannot be made appurtenant to land. He takes it by virtue of the code provisions above referred to. If the street should be subsequently vacated he will then own the land in the street discharged of the burden of the easement, but the vacation does not affect or disturb the title to the land itself, which remains vested as before.

"Unless the deed manifests a clear intention on the part of the grantor to limit the boundary line, that line, when the land is bounded by a non-navigable stream or highway, extends to the center of such stream or highway, if the grantor is the owner of the fee." (22 Cal. 484, 51 Cal. 425, 50 Cal. 31.) And so where a deed describes the land as extending 500 feet to a street and thence at right angles along the street, etc., to beginning, the fee to the center of the street is conveyed subject to the public easement notwithstanding the fact that the distance of 500 feet extends only to the side of the street and not to its center. There is no clear intention in this case to exclude the land in the street. If the description had run to say the east line of the street and thence at right angles along said east line no title to the land in the street would pass by the grant (51 Cal. 196). Where land abuts on a navigable stream or

on tide waters the abutting owners' title extends to the line of mean high tide. Between that line and low water mark the State owns title under its so-called sovereign rights, but owns it in trust for public use.

Where a Mexican grant under U. S. patent is bounded by the ocean, its boundary line follows the line of mean high tide and expands or contracts according to its natural variations.

In construing instruments in a chain of title the above must be carefully heeded because, if in any deed the title to the soil in the street fails to be included, the title remains vested in the grantor and no subsequent deed by his grantee can cure the omission nor will the subsequent vacation of the street divest said grantor of his title.

It may also be considered that when a line in a deed runs to a street thence along the street, by the words of the grant the street becomes a monument and under the rules of constructions, the center of the monument is intended unless the contrary meaning is expressed.

The text books on deeds and descriptions therein cite a great number of decisions covering many examples of varying language with differing shades of meaning and the construction of the same as applied to this question, but under our California statutory provisions a clear intention to exclude the highway must be shown in a conveyance to prevent title passing to the grantee to the center thereof. (See 22 Cal. 491, 50 Cal. 31, 71 Cal. 27.) "Thence along the easterly line of the street" was taken to exclude any part of the street in 51 Cal. 197 and 70 Cal. 541.

Subdivision maps appear of record upon which the owner of the tract dedicates a street along the boundary entirely on his own land. When he deeds a lot fronting on this street, title carries under the above showing to the middle of the street. There are cases in other States which hold that the fee to the entire street abutting passed with the lot on the grounds that as the grantor had expressed no contrary intention it was not to be presumed that he intended to retain what was of no benefit to him and might be of benefit to his grantee. It is not safe or practicable to follow this decision in ordinary practice. But it is clear that if the owner of land across the street should subdivide it and front his lots on the already dedicated street, his grantees in deeds of lots in the new tract would take no interest in the street.

DEEDS AFTER VACATION:

It has been generally held by title men that after vacation of a highway, the property in the street owned by

an abutting lot owner, being no intrinsic part of the lot itself, should always be separately described in any deed conveying the lot and the part vacated. This is still so where no map reference to the tract issued, but under what is known as the Anderson decision a reference to the recorded map makes this unnecessary for the reason that by referring to plat by book and page of its record, the whole plat is read into the deed and used for purposes of construction, becoming the measure of the grant, and since this map shows the highway, the deed of a designated lot will carry to the middle of the adjoining street even tho the street is in fact vacated.

LOT AS STREET:

Where the authorities have rejected an offer of dedication of certain streets upon a map, these are sometimes designated as "Lot A", etc., and are in fact private streets. A deed for lots fronting on such strips should include the right of way for street purposes over the same tho such rights would in most cases pass as appurtenant to the lot as "ways of necessity." (53 Cal. 135.)

FILLED-IN LOT ON WATER FRONT:

Here great care is necessary not to certify to any land not within the true record holding. It is sometimes found that the rear end of a tier of lots in a subdivision runs back into land sometimes under water. The title of the subdivider is bounded by the mean line of high tide. To make his water lots salable he builds a piling in the water, dredges on the outside and fills in the rear of the lot. The filled land is not accretion deposited by natural and imperceptible degrees, but, being moved in by human agency, is no part of the original holding. The description in a policy should except any part of the lot lying below the line of mean high tide.

DESCRIPTION IN POLICY ISSUED:

Too much care cannot be taken in framing the description for the policy or guarantee or certificate as finally issued and especially in writing a description by metes and bounds. Instruments in the record chain of title are often clumsily drawn, but may be sufficient to pass the title. These should not be followed, but a new description should be made giving all necessary ties to established monuments so that the same may be copied from the policy and used in future transactions involving the property. Where a survey has been had showing the land in actual possession it should be followed and boundary line deeds or agreements secured to harmonize it with the record title. Wherever possible the plat of the survey should be recorded so that the property can be designated by a simple reference to the plat.

AREAS TO STREET CENTERS:

Some maps show lots with acreage marked thereon stating that "areas are computed to street centers." Suppose such a lot is bounded by a street on its west side and shows an area of "10 acres" on the plat. A deed for the west 5 acres of the lot conveys, by the weight of authority, 5 acres within the lot lines unless the deed itself states that the acreage is measured to street centers. This leaves less than 5 acres in the east part of the lot unconveyed. The lot is bounded by the lines enclosing it, the street alongside encloses nothing. Boundary deeds should be shown in the search so that no overlaps are passed or unconsidered. Such a description may still carry the title to half the adjoining street, altho the street is not included in the 5 acres of the lot itself which is conveyed. (95 Cal. 661.)

RIGHT OF WAY OF NECESSITY:

A grant includes not only the land conveyed but by implication whatever is necessary to its proper enjoyment (53 Cal. 135). So if the owner of a larger tract deeds a portion of it entirely surrounded by land he retains or partly by land he retains and partly of a stranger, the grantee has what is known as a way of necessity for ingress and egress over his grantor's land. He cannot choose it himself, his grantor may do that, but it must be practicable as a roadway. (55 Cal. 350.)

An owner of land fronting on a dedicated street has an easement in the street as appurtenant thereto and for the proper enjoyment and use of his land distinct from the public right of way. This is so even though he owns no part of the street. This is property which cannot be taken away from him without due process of law. This phase of the question is made clear in the case of Bigelow vs. Ballerino (111 Cal. 568). See, also, Schaufel vs. Doyle, 86 Cal. 109.

DEEDS

EXCEPTIONS AND RESERVATIONS

DEFINED:

An EXCEPTION in a deed withholds from its operation some part or parcel of the thing which but for the exception would pass by the general description to the grantee.

> An exception is that which is cut out of the thing conveyed and title to which is not included in the grant. If it is an actual part of the thing described such as "all water, in, upon and under said land," or "all minerals or rock", etc., it must be excepted from the description as not being included in the particular parcel of land the title to which is being searched and guaranteed.

A RESERVATION, on the other hand, is the creation of some new right issuing out of the thing granted and which did not exist before as an independent right in behalf of the grantor, and not of a stranger.

In distinguishing between a reservation and an exception in a deed the words "reserving" and "excepting" are not conclusive in determining which is intended. The character and effect of the provision itself must determine what is intended. If the intent of the deed is to vest in the grantor some new right or interest which did not before exist in him it is a reservation, but if it was the plain purpose of the parties not to reserve a new right which should vest in the grantor, but to recognize and except from the grant an existing right which would otherwise pass to the grantee, it is the purpose to create an exception, whatever the language used. An exception is always some part of the estate not granted at all. A reservation is always of something taken back out of that which is already granted, no matter what name the parties may give to them.

The rule is to construe a grant against the grantor and to construe a reservation in his favor.

Reservations must not be confused with Conditions, which limit the grantee's use of the land and usually take the form of restrictions upon the use of the premises and as to cost, character and locations of improvements, liquor and race clause. (See under "Conditions".)

HOW EXCEPTIONS AND RESERVATIONS HAVE BEEN CONSTRUED:

In Blackman vs. Striker (N. Y. 1892) the deed conveyed a certain lot 2 "saving, excepting and reserving" "the family burying ground", describing the same. Held that the fee of the burial ground passes to the grantee subject to the easement in favor of the heirs.

In Biles vs. Tacoma and O. R. R., 5 Wash. 509 (32 Pac. 211), it was held that a conveyance of section property containing the following "reserving and excepting" strip 400 feet wide "to be used for right of way," did not operate as an exception of the strip, but merely a reservation of a right of way or easement in the land and the title to the whole tract vests in the grantee by virtue of the deed.

In Fisher vs. Laack, 76 Wis. 313 (45 N. W. Rep. 104), the deed described the land conveyed as "Lot 8, Blk. 19— except the south 12 ft. of said lot to be used as an alley." Held, "this language is plain and unambiguous and proof of extrinsic facts is inadmissible to contradict or affect its construction. The word 'except' is employed, but the subject matter to which it refers is a reservation." No general rule can be laid down for the treatment of exceptions and reservations in deeds. Each case must be considered alone on its merits. A provision that the grantee shall make certain improvements for the grantor's benefit, as that he shall build a culvert, is plainly a reservation (30 Am. Rep. 672); but a provision for retention of possession by the grantor is held to be an exception out of the body of the estate. (24 Am. Rep. 191.)

The rule that a reservation must be something not in being, but newly derived from the thing granted, must not be understood as preventing the reservation of some right which the grantor previously enjoyed. That is to say, as owner of the fee the grantor had the absolute right to any lawful use of his land. But those rights did not exist as things separate from his land. The effect of the deed with a reservation is to sever the one from the other, and the reserved right becomes in a legal sense a new thing derived from the land. So a reservation by an owner conveying land, of the free flow of light and air over it without obstruction, is good as something not in the sense of the law, before existing, but derived from the thing granted. (58 Am. Dec. 734.) This theory will be found to have been frequently applied by the courts in passing upon the reservation of an easement. (8 R. C. L. 1089.)

Generally it is declared that a reservation must be in favor of the grantor or party excepting the conveyance and not to a stranger (cases cited and notes, 13 L. R. A. 289; 20 L. R. A. 634), but there are some cases holding or

intimating the contrary (20 L. R. A. 634; 20 L. R. A., N. S., 221, Am. Cas. 800), a better statement of the rule is that, a reservation in a deed to a stranger being by the weight of authority invalid as a reservation, the tendency of the courts is to effectuate the intention of the grantor by treating it as an exception. (20 L. R. A., N. S., 221; 18 Am. Cas. 800.)

A reservation is not the less made to the grantor if it is so made that others can derive advantage from it; it will be considered as made to him when valuable rights are secured to him, though others may be benefited by it. (58 Am. Dec. 734; 8 R. C. L. 1091.)

The following cases are cited in support of the opinion that language such as "Reserving therefrom a strip of land 25 ft. wide off the east side for street purposes" constitute a reservation instead of an exception:

See 503 Jones on Real Prop.
Ashcroft vs. R. R., 126 Mass. 196 (50 Am. Rep. 672).
Elliot vs. Small, 25 Minn. 396 (59 Am. Rep. 329).
Kister vs. Reeser, 98 Pa. St. I (42 Am. Rep. 608).
Blackman vs. Striker, 21 N. Y. Sup. 563.
Biles vs. R. R., S. Wash. 509 (32 Pac. Rep. 211).
Fischer vs. Laack, 76 Wis. 313 (45 N. W. Rep. 104).
Winston vs. Johnson, 42 Minn. 398 (45 N. W. Rep. 958).

SHOWING RESERVATIONS, ETC., IN CERTIFICATES:

(a) Rights of way and easements should be separately set forth.

(b) Reservations of pipe lines, pole lines, water, oil, gas, minerals and like should be separately set forth, care being taken to determine whether the matter referred constitutes an exception from the fee which should be excepted from the description.

(c) Liquor restrictions and ordinary restrictions as to buildings, their kind, cost and character, alignment, use, occupancy and the period set for their termination.

(End of Subject)

ESCROWS

DEFINED:

An escrow is the deposit with a third party of a conveyance or instrument in writing made upon the terms of a written contract, with instructions for its delivery upon the performance of a condition or the happening of an event.

There is a material difference between a true escrow and the mere deposit of papers with the third party, tho in ordinary business language the word "escrow" is used to include all such transactions.

DEPOSIT ONLY:

In the case of a deposit of papers in escrow, the escrowee is no more than a depositary or agent of the parties. His authority may be revoked and the papers withdrawn and if the depositor should die or become incompetent, his administrator or guardian may demand a return of his deposit and the property involved becomes an asset of his estate.

In such a case care must be taken to ascertain whether the conditions of the escrow have been fulfilled or not before returning the deposit. If there has been no consummation, the administrator has no power to consent to the terms of the incompleted escrow as the property belongs to the heirs of the decedent.

TRUE ESCROW:

A true escrow cannot be revoked within the time limit designated once the minds of the parties have met and the conditions are fulfilled, unless the parties mutually agree to a cancellation or withdrawal. A simple example of a true escrow is where A makes a deed to B and delivers it to C with instructions that C shall deliver the deed to B upon the death of A. The deed is placed beyond recall by A and upon his decease C takes title as of the date of the deed to which delivery relates back. The title vests at once in B, subject to the life estate of A until he dies.

In a true escrow when conditions have been met the death or incapacity of either party is ineffective to alter or affect the transaction. Much depends upon the way the escrow instructions are drawn. When a deed is deposited with a third party it becomes an escrow provided the parties have made a valid contract of sale in writing. The deed itself may be sufficient if it contains the terms of the contract including the true consideration.

CONTRACT:

In explanation of the above it should be noted that a Contract is an agreement enforceable at law; it must be based upon an adequate consideration and the minds of the contracting parties must have met. It must be in writing to satisfy the Statute of Frauds.

STATUTE OF FRAUDS:

Deeds and contracts were at one time valid and enforceable if made verbally. So much confusion and false testimony occurred that in the reign of Charles II the English Statutes of Frauds was enacted which declares void any conveyance of an interest in real property and certain other contracts unless the same are reduced to writing. Our States have enacted substantially the same statute into their laws. It does not affect leases of real estate for less than one year, but includes a contract for the sale and purchase of land.

STATUTE OF LIMITATIONS:

This must also be understood. It limits the period within which legal proceedings may be commenced and avoids unreasonable delay in pursuing the rights and remedies of an injured party. When the period has elapsed the right or claim is said to be "outlawed"; it is "barred by the statute" or "the Statute of Limitations has run".

Thus money judgments and actions for the recovery of real property outlaw in California in 5 years; contracts in writing in 4 years. This governs the outlawry of a promissory note, and as in California a mortgage is only incidental to the debt it secures, when the note outlaws the mortgage itself cannot be foreclosed. The statute is, however, not self-executing, it must be pleaded. So it results that a mortgagor who has not paid his debt cannot plead the statute. To obtain equity he must do equity and come into court with clean hands. But an innocent purchaser of the property from the mortgagor can presume that the debt is paid within 4 years from its due date and plead the statute as a bar. Open accounts outlaw in 2 years.

EXAMPLE OF INCOMPLETE ESCROW:

The law is very clearly explained in the case of Holland vs. McCarthy (52 Cal. Dec. 499) under the following facts:

A made a deed to B and deposited it with C with instructions to deliver the same upon payment by B, the grantee,

to C, the depository, of a named purchase price. A died and his administrator brought suit to quiet title to the property against B and C. It was held:

1. That the transaction did not constitute an escrow.
2. That A had the right to recall the deed at any time before the money was paid to C.
3. That until the money was paid in C was the voluntary agent of A holding the deed subject to his order.
4. That until such payment the deposit of the deed was not more than an offer which A could withdraw.
5. That upon the death of A the authority of C to accept the money and deliver the deed ended.
6. That until the time of death A had not parted with the title nor was bound to do so and the title vested thereupon in the heirs of A free from any claim of B.
7. No interest could vest in B sufficient to make an escrow beyond recall without payment of some consideration by B.
8. That the deposit of a deed with a third party to be delivered only on payment of a fixed price cannot be sustained as an escrow where there exists no prior or contemporaneous contract of sale of which delivery of the deed was to be the consummation.

It appears from this decision that to place the deed beyond recall by the grantor either the money must be paid in or there must be a contract of sale and purchase between the parties to make a true and irrevocable escrow. If such a contract exists the escrow holder returns the money at his peril.

PREMATURE DELIVERY BY ESCROWEE:

A deed placed in escrow and delivered before the conditions for delivery are complied with does not pass the title (23 Cal. 528). An innocent subsequent purchaser is not protected (45 Pac. 800). There is no real delivery in such a case. The escrow holder may be the agent of the grantor and the fraud or mistake of the agent be unquestionable by the principal, but to be a bona fide purchaser a vendee must deraign his title under a conveyance, this is not void. Such a conveyance falls within the same class as a forged or stolen deed.

CLAIM ON ESCROWEE BY STRANGER TO DEAL:

A stranger to the escrow occasionally makes a claim for money, commission or proceeds, or asserts he has an undisclosed interest in the property. Against this we find that the burden of proof to establish a trust interest not disclosed by the records is upon the claimant (145 Cal. 410). Written notice to an escrow holder by person having no record connection that he claims an undivided half interest in the property is not notice and may be ignored (Kowalsky vs. Kimberlin et al., decided Nov., 1916). To be effectual notice must be complete enough to put a person on guard (77 Cal. 449). However, the knowledge of the agent is imputed to his principal (165 Cal. 326) and the agent is liable to his principal for loss sustained in connection therewith (9 Pac. 709).

PRO-RATING TAXES THRU ESCROW:

County taxes become a lien at 12 o'clock noon on the first Monday in March, but the fiscal year to which they apply commences on the 1st day of July following and runs to June 30th of the next year. If a purchaser takes title say on October 1st, is the seller chargeable with his pro rata of taxes to said date from the first Monday in March or from July 1st? It is customary to accept July 1st as the date in all realty transactions and last year's assessment as the basis, unless the actual assessment for the current year is known from the tax rolls. Customers should understand this. If improvements have been placed on the property since last year's assessments, the value of these must be considered also. It is always advisable to get in the tax statements or receipts. Where a street bond is to be surrendered, secure the bond itself before closing.

COMPUTING INTEREST:

On notes secured by mortgage or trust deed, compute the time on a basis of 30 days to a month unless instructions call for a stated amount per day.

On judgments the interest is 7 per cent per annum and must not be compounded (1920 C. C.) and unless there is a written contract to the contrary, all money due carries 7 per cent interest. In computing interest for a period less than one year, 360 days are deemed to constitute a year. (1917 C. C.)

PRO-RATING RENTS:

Ascertain date on which the rental month ends and compute time on the basis of the actual number of days, allowing purchaser the benefit of the day papers are filed.

INSURANCE IN ESCROW:

Where insurance is handled do not close until the necessary waivers or transfers are obtained. Mutual policies are sometimes subject to further assessments which the purchaser should know about. When premiums are pro-rated see that they have been paid before transfer is made and ascertain who pays fees when insurance is "transferred free". Get in all insurance or cover its delivery before closing.

HOMESTEAD PROPERTY IN ESCROW:

Deeds of and loans upon homesteaded property must be handled in such a way that all proceeds inure to the benefit of both husband and wife, where the owner is married, and checks must be made payable to both spouses.

FUTURE ADVANCES:

It often happens that the escrow involves the filing of a mortgage with a junior mortgage or trust deed to follow. If the first mortgage provides for future advances to be made, the junior encumbrancer should be made to understand that these advances will take precedence over his own lien and to assent to same.

LIABILITY UNDER CERTIFICATE OF TITLE:

The certificate is not the contract between the searcher and his employer upon which to base an action, but the action is one for negligence in not exercising skill and care and the claim was held to outlaw in two years in the old case of Lattin vs. Gillette (95 Cal. 317). In case of simple negligence in Moody vs. McDonald (4 Cal. 297) it was held that actual damages only should be allowed. The value of the property at the date of issuing the certificate governs not any increased value that has attached since. The liability of conveyancers for errors of judgment is the same as that which applies to practitioners of law or medicine. (Watson vs. Moorhead, 96 Am. Dec. 213.)

BROKERS' COMMISSION:

An oral agreement to pay commission will not be enforced by the courts. The employment of the agent must be in writing to satisfy the statute of frauds, tho it be only a note or memorandum of the oral contract. This can be amplified later, if disputed, by testimony as to its complete terms. The essential fact which must be in writing is the fact of employment. The amount of the commission may be shown by parol or may be measured by the services rendered. (Muncy vs. Thompson, 147 Pac. 178; see, also, 97 Pac. 81.) The rendering of services is not sufficient

without the writing. (141 Cal. 109; Crawford vs. Kennedy, 222 Pac. 644.)

CHECK AS CASH:

A check is not cash, it is not lawful money which a creditor can be compelled to accept. But the law recognizes that by consent of the parties, checks may be used as representing cash (2076 C. C. P.; 56 Cal. App. 502).

(End of Subject)

ESTATES AND PROBATE MATTERS

TITLE UPON DEATH:

A person has no natural right to control his property by disposition after his death, but the statute allows him to determine whether he shall permit his estate to descend to those persons whom the law designates as his successors or whether he will prevent such descent and make his own disposition of it by will. This right being statutory may be availed of only upon compliance with the strict requirements of the statute. Community right or interest, the right of homestead and protection for the family are all superior to the power of devise or bequest.

HISTORICAL:

Wills were allowed by the laws of England under Saxon rule, but were later held repugnant to the feudal system, the aim being to center all land titles in the Crown as the source of all power, and to this day an allodial title is unknown in that country. The original Statute of Wills was passed in the reign of Henry VIII and succeeded the powers of appointment used prior thereto to control the disposition of real property after death.

In the United States laws governing succession and devise were early enacted and in California the whole process of passing down the title is minutely and clearly covered by statutes defined and clarified by decisions of authority.

The estates of persons dying before the adoption of our State Constitution were subject to administration under the laws of Mexico. The heirs or devisees took title at once, subject to the debts of the decedent, which were of no concern to the court.

Since that time when a person dies owning property the title vests immediately in his devisees if he left a valid will or in his heirs if he made no testamentary disposition of it under the laws of succession, subject, however, to debts outstanding and administration by the Superior Court sitting in probate.

PROBATE COURT, AUTHORITY OF:

Administration of the estates of deceased persons and distribution thereof to those entitled thereto and proceedings in connection therewith are purely statutory. The probate court has only such powers as are derived from the statute and powers incidental to the exercise of the jurisdiction conferred. (88 Cal. 374; 102 Cal. 8.)

SUCCESSION:

This is defined in 1383 C. C. to be "The coming in of another to take the property of one who dies without disposing of it by will".

REASONS FOR ADMINISTRATION:

These are defined in Estate of Moore, 57 Cal. 437, and in Phelan vs. Smith, 100 Cal. 465, as -

1 - To support the family for a period.

2 - To set apart a homestead for the family.

3 - To pay the expenses of administration.

4 - To pay the debts of the decedent.

5 - To distribute the balance of the estate to those who take it by law.

NECESSITY FOR PROBATE PROCEEDINGS:

In the Estate of Strong (119 Cal. 663) administration was commenced upon the estate of intestate, administrator was appointed, and upon representation to the trial court that the matter had been settled amongst the heirs the court found there was no necessity for administration and dismissed the proceedings. Upon appeal the Supreme Court finds as follows:

> "Whatever the law may be in other jurisdictions, there is nothing in our probate law which would, either expressly or by implication, exempt the property of this estate from the requirement of administration. The whole subject matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplates that property of decedents left undisposed of at death (except in the instance of the homestead, acquired under certain circumstances as provided for in Section 1474 of the Code of Civil Procedure) shall for the purposes of ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established."

> "Probate proceedings being purely statutory, and therefore special in their nature, the

> Superior Court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. (Smith vs. Westerfeld, 88 Cal. 374, 379.)"

In this case reference is made to 112 Cal. 14, from which the following is quoted:

> "We know of no such authorized method under the law of dispensing with the usual and ordinary administration of an estate of a deceased person, or of thus determining the question of title to real property as between an estate and persons claiming adversely to it. Under the facts appearing, it was the duty of the court to proceed and appoint an administrator with the will annexed, to complete the administration."

> "The only way to establish heirship would be by proceedings in probate. (Estate of Conroy, 6 Cal. App. 741.) The probate court has exclusive jurisdiction to determine matters involved in a distribution. Independent action in equity gets no jurisdiction. (Estate of Freud, 134 Cal. 333.) 'Through a decree of distribution only can title to land be justly established.' (Blair vs. Hazzard, 158 Cal. 721.) See, also: 152 Cal. 129; 129 Cal. 148, and Goad vs. Montgomery, 119 Cal. 552, which decide that a coordinate court has neither controlling nor advisory jurisdiction over the probate court. Also see Trout vs. Ogilvie, 41 Cal. App 167, for statement of law covering this question."

COURT CAN DETERMINE ASSETS:

Probate court can determine as between heirs if property is asset of estate or not (Estate of Simonton, 59 Cal. Dec. 588), but not as between heirs and strangers. (164 Cal. 274; 40 Cal. 124.)

COURT CANNOT TRY TITLE:

The case of Anderson vs. Fisk, reported in 41 Cal. 308, decided that

> "a probate court has no authority on petition of an executor to order him on receipt of the money loaned to reconvey real estate conveyed to his testator by deed absolute on its face but intended only as security for the repayment of such money."

The probate court is not a court of equity. (131 Cal. 73; 135 Cal. 323; 136 Cal. 598.)

WILL DEFINED:

A will or testament is the disposition of property to take effect at the death of the testator or maker.

WHO MAY MAKE A WILL:

Every person of sound mind, over 18 years of age, may make a will and dispose of real and personal property unless the maker is actuated by duress, menace, fraud or undue influence.

A married woman may dispose of her separate property by will as though she were single.

All property or interest therein owned at death may be willed except for the special provisions regarding community property of husband and wife. (See separate paragraph.)

Any person capable at law to hold property may take under a will, except that no corporation, other than counties, municipalities and corporations formed for scientific, literary or solely educational or hospital purposes, can take property by will unless authorized by statute.

DIFFERENT KINDS OF WILLS:

The law allows the admittance to probate of several kinds of wills with certain requirements as to each kind. They are:

(1) WRITTEN WILL:

This must be in writing, subscribed by the testator or by some person for him in his presence and by his direction, with two attesting witnesses signing at the testator's request and in his presence and each writing also his address, and they must not be interested under the will on pain of losing their devise or legacy.

(2) HOLOGRAPHIC WILL:

This must be written, dated and signed entirely by the testator. There are no formalities required.

(3) NUNCUPATIVE WILL:

This is sometimes called the spoken will. It need not be in writing and requires no formalities, but the property disposed of must not exceed $1,000.00. It must be proved by two witnesses who were present and were asked by the

testator to bear witness that it was his will. It must be reduced to writing within 30 days and offered to the court within 6 months, and the decedent must have been in active military or naval duty at the time and in peril or contemplation of death.

(4) CONDITIONAL WILL:

This kind of will is valid with reference to the happening of the condition upon which it is predicated.

(5) MUTUAL WILL:

Made conjointly, usually by husband and wife, but may be revoked by any of the makers at any time. It requires the formalities of a written will.

JOINT WILL:

One who goes into agreement with another to make a conjoint or mutual will does so with statutory notice that such a will is subject to revocation under 1279 C. C. (Estate of Rolls, 67 Cal. Dec. 445.) In this case husband and wife made a mutual will. The husband died and the wife made a separate will thereafter. The mutual will was probated. The court found the separate will of the widow revoked the will as to her. One-half the estate was distributed under the mutual will, the other half, the widow's community share, was subject to her testamentary disposition. While a joint disposition of property is irrevocable in equity as a contract, as a will it is revocable by either. If either die without revocation the will becomes his last and separate will. The probate court could not enforce the mutual will as a contract. Equity might uphold the contract in the interest of the original beneficiaries and declare the distributees under the separate will to be trustees for said beneficiaries. (183 Cal. 359; 175 Cal. 81; 181 Cal. 336.) Meanwhile an innocent purchaser for value from the distributees would be protected.

REVOCATION OF WILL:

A will may be revoked by a writing of the testator declaring such revocation or alteration, executed with the same formalities as a written will, or by being canceled or destroyed purposely by the testator.

A will made before marriage is revoked by marriage or by birth of issue, when wife or issue survives the testator, unless provision has been made for such issue or the will shows such provision is intentionally omitted.

A will made before marriage is revoked by marriage if the wife survives the testator unless provision is made

for her by marriage contract, or in the will, or unless the will shows she is intentionally omitted therefrom.

A will by a woman is revoked by her marriage thereafter.

Revoking a will annuls all its codicils.

EFFECT OF SUBSEQUENT CONVEYANCE ON A WILL:

Where testator makes contract of sale of property devised, the devisee takes subject to the contract.

Where testator mortgages property devised, the devisee takes subject to the mortgage.

Where testator deeds property devised, the devise is revoked entirely, but a deed for a portion of his property does not revoke his devise as to the remainder unconveyed.

CHILD UNPROVIDED FOR:

A child unprovided for by settlement or unmentioned in the will succeeds to so much of the estate as would be his had the parent died intestate, unless such omission is intentional.

INHERITANCE BY REPRESENTATION:

If a child or other relative of the testator dies before him, the lineal descendants of the devisee take the estate willed.

AFTER ACQUIRED PROPERTY:

All property owned by testator at his death passes by will whether acquired before or after making the will, unless the will expresses a contrary intention.

CHARITABLE BEQUESTS:

Not good unless the will was made thirty (30) days before death of testator. Such bequests or devises must not collectively amount to more than one-third of the estate. If they exceed one-third they are not void, but must be reduced proportionally. Exception to this provision exists in favor of the State or any institution of the State.

FOREIGN WILLS:

A will admitted to probate in any other State or foreign country, or a copy duly authenticated, may be presented and admitted to probate in this State without further proof of due execution.

AFTER DISCOVERED WILL:

May be admitted to probate even after a previous distribution. (Estate of Walker, 42 C. D. 194.)

REMAINDERS, VESTED OR CONTINGENT:

A remainder is vested when the taker is in existence and whose right no contingency can defeat to take on expiration of prior estate. It is contingent when it depends on the happening of an event which may never take place. It is vested when there are words of "present gift" to a class of persons in existence, though it cannot be determined which, if any, members of the class will ultimately take. (11 Cal. App. 735, Estate of Washburn.)

INHERITANCE BY ALIENS:

Resident aliens may take by succession as citizens. A non-resident foreigner must appear and claim his succession within five (5) years after death of the decedent.

JURISDICTIONAL REQUIREMENTS (1294 C. C. P.):

Wills must be probated and letters testamentary or of administration issued by the probate court.

(a) If a resident of California, in the county of which the decedent was a resident when he died.

(b) If a non-resident of California, in the county where the decedent died leaving estate therein.

(c) In any county where the decedent owns property if he died out of the State and was a non-resident.

(d) In any county where decedent owns property, being a non-resident but not leaving estate in the county where he died.

(e) In other cases where application for letters is first made.

Death and residence constitute the jurisdictional facts which must be properly shown to give the court authority to proceed. (7 Cal. 233.)

ESTATE OF LIVING PERSONS:

Proceedings had on the estate of a person proved later to be alive are void. The court has no jurisdiction till the estate owner is deceased. The supposed decedent may have such proceedings set aside. (61 Cal. 60.)

PERIOD FOR CONTEST OF WILL:

The validity of a will may be contested at any time within one year after admission to probate, except as to minors and incompetents who have one year from removal of disability.

ADMINISTRATORS AND EXECUTORS

APPOINTMENT AND QUALIFICATION:

The appointment of an administrator is a proceeding in rem (147 Cal. 343). He must give bond before letters are issued (79 Cal. 16, 112 Cal. 260). Bonds must be payable to the State of California and must be joint and several (958 Pol. Code). Bond must be signed by principal (101 Cal. 125), but administration without bond is not void (81 Am. St. Rep. 554). Bond may be filed after letters issue (112 Cal. 267). The giving or not giving of bond is not subject to collateral attack. (101 Cal. 125; 44 Ohio 637; 9 Utah 101; 81 Ala. 548.)

Order appointing administrator made upon petition setting forth the jurisdictional facts is tantamount to an adjudication of the existence of such facts. (84 Cal. 107.)

Petition for letters not signed by applicant was held good in Baxter vs. Booge. (52 Cal. Dec. 493.)

No letters issued though administrator was appointed. Proceedings not invalidated because clerk failed to perform ministerial duty. (122 Cal. 39; 120 Cal. 350; 115 Cal. 152.)

Letters of administration, if good on their face, are conclusive against collateral attack even if oath and bond are defective or absent entirely. (Dennis vs. Bint, 122 Cal. 39; 173 Cal. 589.)

The appointment of an executor is proven by introduction of the letters. (134 Cal. 237; 183 Pac. 222.)

Section 1373 C. C. P. providing for notice of hearing petition for letters of administration has been amended so as to require that notice of hearing be mailed to the heirs of the decedent named in the petition at least ten days before the hearing. (1921.)

Marriage before or after appointment does not affect a woman's qualification to act as administratrix or executrix.

Where record does not show that letters of administration were issued. (See 39 Am. Dec. 326; 122 Cal. 39; 33 Am. Dec. 299; 7 Cal. 215.)

SPECIAL ADMINISTRATORS:

Special administrators are appointed without notice. Their powers are limited and must be set forth in the court minutes showing the appointment. When an estate needs immediate attention a special administrator may be appointed

to act until the appointment of the general administrator, upon which his authority ceases.

A special administrator may be made defendant in a suit to quiet title (157 Cal. 373) with the same effect as against a general administrator.

Sections 1412-1415 C. C. P. relative to the appointment and duties of special administrators have been amended to provide that when a special administrator is appointed pending determination of a contest of a will instituted prior to probate thereof or pending an appeal from an order appointing, suspending or removing an executor or administrator, such special administrator shall have the same powers, duties and obligations as a general administrator and the letters of administration issued to him shall recite that such special administrator is appointed with the powers of a general administrator. Said Section 1412, as amended, provides that such notice of hearing of petition for appointment as the court may deem reasonable shall be given. (1921.)

ONLY ONE ADMINISTRATOR:

Appointment of new administrator, former one not removed or his resignation accepted, is void. (20 Cal. 288, 140 Cal. 194, 84 Cal. 110, 120 Pac. 767.) Where there are more than two executors, the majority may act. Where there are two, one may act if the other is absent from the State or under disability or if he gives the other authority in writing.

ADMINISTRATION AFTER DISTRIBUTION:

An administrator may continue to perform the duties of his trust after distribution and until discharged. (51 Cal. 146, 60 Cal. 260.)

PUBLIC ADMINISTRATOR:

The public administrator may continue to act after expiration of his term of office. (11 Cal. 120, 34 Cal. 468, 100 Cal. 80, 146 Cal. 591.) He must be specially appointed in each estate in which he acts. He can be appointed as a special administrator. He needs no special bond besides his official bond, but an additional bond may be required when he sells real estate.

FOREIGN ADMINISTRATOR:

Appointed in another State has no authority to act in California. (1913 C. C. P.) He cannot assign a mortgage on property in another State. (54 Am. Rep. 386.) He can release a

mortgage in this State by complying with Section 2939½ C. C. (89 Cal. 348, 79 Cal. 278, 70 Cal. 403.)

ADMINISTRATOR WITH WILL ANNEXED:

Has power to sell under the will. (80 Cal. 89.)

PROOF OF RESIDENCE:

An order of court granting letters of administration is a final adjudication of fact of residence. (Estate of Ralph, 61 Cal. Dec. 559.)

ACTIONS AGAINST:

An executor may voluntarily appear in an action. (132 Cal. 453.)

When an administrator is sued the complaint must contain proper averments to bind the estate. (77 Cal. 257, 139 Cal. 623, but see, also, 72 Cal. 547.)

An administrator may stipulate for judgment (123 Cal. 674). A compromise by administrator in this case was upheld.

DEDICATION OF MAP BY EXECUTOR:

An executor cannot dedicate highway as against heirs (50 Cal. 471). He cannot give away property of estate (74 Cal. 436).

PARTITION:

An administrator cannot bring an action for partition (126 Cal. 482). Power to sell given executor or trustee does not authorize a partition (134 Cal. 657, 2348 C. C. P., 14 Am. St. 773).

CANNOT DISCLAIM OWNERSHIP:

An executor cannot admit his testator held only as trustee (112 Cal. 387) or as mortgagee (41 Cal. 308, 88 Cal. 374). The court has no power to order administrator to reconvey property held in trust to secure debt under deed absolute (41 Cal. 308).

PROPERTY WRONGLY INVENTORIED:

This may be corrected by filing a second inventory which shows true condition of the estate. (100 Cal. 158, 169.)

FOREIGN CORPORATION AS TRUSTEE UNDER WILL:

Michigan Trust Company named in will as trustee may take distribution of estate under Sec. 7 of Bank Act, which is upheld as constitutional, having qualified by filing copy of its articles with Secretary of State and Superintendent of Banks. Re Estate Josephine Wellings vs. Bronson, Supreme Court decision December, 1923.

PROBATE HOMESTEAD:

This is a homestead set apart by the court in a probate proceeding where no homestead has been declared in the lifetime of the decedent which on death will vest absolutely in the survivor. The property is taken out of the legal channel of devise or succession and a new title is created by the court order itself.

It can be set apart only when there is a surviving husband or wife or minor children, so that if the widow should remarry or the children attain majority before having such a homestead created, their respective rights would be lost to them.

The title on creation vests in the surviving husband or wife and the minor children if there are any. If both parents are deceased then title vests in the minor children entirely.

Although the husband cannot declare a homestead upon the separate property of the wife in her lifetime without her consent, a probate homestead can be carved out of such property by the court on her decease, but where the separate property of the decedent is set apart it can be assigned only for a limited period and the property affected vests in the heirs or devisees subject to administration (1468 C. C. P.) and subject to the effect of the limited probate homestead.

A probate homestead taken from community property vests as follows:

(a) If decedent left a surviving spouse and no minor children, title vests in said spouse.

(b) If decedent left a surviving spouse and a minor child or children, title vests one-half in said spouse and one-half in the minor child or children.

(c) If decedent left no surviving spouse, but left a minor child or children, title vests entirely in the minor child or children.

As each child comes of age he retains his vested interest in the property subject to the homestead interest

and right of possession of the widow and other minor children. He can deed or mortgage his interest, but it will remain subject to said homestead rights. So, also, can the widow (133 Cal. 99), but on foreclosure of her mortgage the purchaser would take her half of the property as tenant in common with the other owners, subject to the homestead interests of the minor children with no right to possession until the youngest minor had come of age.

The interest of a minor child is subject to sale by his guardian with like effect. (120 Cal. 421.)

When the youngest child reaches majority, the widow and children can convey the property clear of the widow's remaining homestead right - or they could maintain a suit in partition.

SECTION 1469, C. C. P.:

When the value of the entire estate of the decedent does not exceed $2500 (since amendment in effect July 29, 1921) or did not exceed $1500 prior to said date, the court may set off the whole estate to the surviving widow or minor children, subject to existing liens, debts and incumbrances and there shall be no further administration.

The order of assignment creates a new title in the assignee. So a quitclaim deed from the widow prior to the order would not be sufficient to pass a good title. A grant deed would be good. * This order is a final judgment and not open to collateral attack (63 Cal. 16, 149 Cal. 98, 162 Cal. 433). In Eisenmayer vs. Thompson (62 Cal. Dec. 127) an attempt was made to set aside such an order made more than a year previously on the ground of fraud, the estate being worth much more than $1500. The Appellate Court held the original order was final and conclusive, reversing the trial court, and that testimony disputing the finding of the probate court could not be admitted.

The Court has power to set aside to the widow, under this section, property upon which a homestead has been declared. (Est. of Neff, 139 Cal. 71.)

This section applies to the separate property of husband or wife or to community property and a wife's estate can go to the minor children without further administration. (Est. of Leslie, 118 Cal. 72.)

Setting aside property to widow under 1469 C. C. P. held not invalid although no inventory was filed, under analogy of 171 Cal. 583 (Est. of Betts).

PROBATE SALES AND CONVEYANCES:

If an estate is solvent, the family allowance, ex-

penses of administration and debts must be paid before estate is closed. If there is not cash available, property must be sold to raise funds.

Personal property must be sold first, then the realty. A sale of real property may also be made when it is shown to have been for the best interests of the estate.

Petition for order of sale must be verified. (116 Cal. 575.)

Notice of sale of real estate by administrator must be published up to day of sale. (112 Cal. 661, 121 Cal. 524.)

Power to sell given in the will is not good as to a pretermitted heir. (88 Cal. 582.)

Commission may be allowed paid to agent on sale. (26 Cal. 113.)

A sale of devised property "for the best interests of the estate" is good after 1893 and may be passed 60 days after confirmation or when the specific devisee files a waiver of objection. (129 Cal. 86, 191 Pac. 678.)

The estate in remainder vested in the heirs subject to a probate homestead is salable by administrator. (139 Cal. 149, 145 Cal. 236.)

Sale by executor under power in will is subject to an increased bid in court. (85 Pac. 155.)

Assignment of mortgage by administrator amounts to a sale of personal property. An assignment without order of court was invalid. (131 Cal. 62, 1517 C. C. P.)

A sale of personal property may be made, but must be confirmed. (1523 C. C. P., Stat. 1921, p. 193.)

Husband cannot by will authorize sale except to pay debts. (120 Cal. 89, 25 Cal. 13.)

Administrator with will annexed has not power of sale as executor. (130 Cal. 169, 80 Am. Stat. 89.)

Executors can convey without confirmation of sale where property has been devised to them in trust. (49 Cal. 76, 92 Cal. 183, 144 Cal. 126.)

EXECUTOR'S SALE TO DUMMY FOR SELF:

Oklahoma case, Gay vs. Williams, 219 Pac. 906, on Oct. 23, 1923, where guardian deeded and purchaser conveyed to guardian as individual 63 days later, who deeded to others. Held void at suit of ward.

Order to mortgage is good even if it contains power of sale, but Code does not authorize order to make a trust deed. (See Sec. 2932 C. C.)

Section 1551 C. C. P. relative to sale by executor or administrator upon credit has been amended to provide that the purchase money notes shall be secured by either a mortgage or deed of trust. (Stat. 1921, p. 209.)

PROBATE SALES:

The amendments of July 22, 1919, governing sales were upheld by Supreme Court in re Estate of Benvenuto on July 27, 1920. The notice given by filing returns of sale is due process of law and interested parties may then ask for additional bond to be given. (60 Cal. Dec. 115.)

These amendments are applicable to all proceedings subsequent to enactment.

WIFE'S COMMUNITY INTEREST:

Sale under code provisions carries and includes this interest, but it is unsafe to so assume on sale by executor under power in will unless to pay debts. Sale under power in the will is not judicial. (98 Cal. 603, 102 Cal. 569.)

Return of sale by administrator when not verified good against collateral attack. (63 Cal. 16.)

LEASE BY ADMINISTRATOR:

Is subject to any judgments against heirs of decedent. Sec. 1555 C. C. P. gives purchaser at probate sale title as at decedent's death, but the statute does not so protect a lease.

COMPLETION OF CONTRACT TO BUY:

Payment to administrator of balance due by decedent to vendor without permission of Court is not improper, but is subject to investigation on settlement of accounts by the court. (Est. of Bottoms, 156 Cal. 129.)

Court cannot order administrator to convey on verbal contract of decedent. (49 Cal. 469.)

Orders of confirmation should recite order of sale, if prior to amendments of 1919, return of sale, person to whom sold; that notice of sale had been posted and published, and notice of hearing of confirmation has been posted, and it should order that the sale be confirmed to the person purchasing, and order conveyance to be executed to him upon payment of the purchase price. (Sec. 1555 C. C. P. as amended

and effective July 22, 1919, does not require any reference to an order authorizing sale.)

Where a sale is made under a power contained in the will, notice of sale need not be published or posted, and consequently the order need not recite proof of publication and posting of notice of sale.

A conveyance by an administrator, guardian, executor, etc., must refer to the order authorizing and confirming the sale of the property, and to the record of the certified copy of confirmation in the office of the County Recorder, either by date of such record, or by volume and page of record.

Such a deed cannot be legally executed until after such order of confirmation has been filed for record, or unless the copy of the decree is recorded at the same time with the deed. (See Sec. 1555 C. C. P.)

A deed from an executor under power in the will does not require any recital as to authority given. (30 Cal. 568.)

JUDGMENTS AGAINST DECEDENT:

No execution may issue after death of debtor on a money judgment docketed prior thereto. The judgment does not cease as a lien and must be presented to the administrator or executor for payment as other debts.

If execution has been actually levied prior to the death, sale may be made thereafter.

A debt secured by a lien has precedence only as to the property covered by the lien and any deficiency ranks as a general claim.

CLOSING AND DISTRIBUTION

The decree of distribution does not create any new title. By it the title is declared and established in the persons who take by the laws of succession or under the will. The actual transfer dates from the time of death, at which moment the title passes and vests.

Distribution cannot be made until the accounts are settled (88 Cal. 374, 122 Cal. 528), nor after administrator is discharged (175 Cal. 199).

CONCLUSIVENESS OF DECREE (1666 C. C. P.):

A decree of distribution of an estate, after due notice by the probate court, is conclusive upon a person who might have claimed that a share of the estate belonged to him. (Crew vs. Pratt, 119 Cal. 149.)

"The distribution of the estate includes the determination of the persons who, by law, are entitled thereto, and also the proportions or parts to which each of these persons is entitled...By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their right to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him 'subject only to be reversed, set aside, or modified on appeal'. The decree is as binding upon him, if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court."

(William Hill Co. vs. Lawler, 116 Cal. 359, cited in Mulchaney vs. Dow, 131 Cal. 77.)

It is within the jurisdiction of the court to determine what persons had legal or equitable rights to the distributable property of the estate and the extent and nature of their interests, when the decree does so determine them, although the determination may be incorrect, it is conclusive as to the rights of heirs, legatees, and devisees unless corrected on appeal. (Luscomb vs. Fintzelberg, 162 Cal. 438, and cases therein cited.)

SUBJECT TO REVIEW IN EQUITY:

Although the decree of distribution has been held to "bind the whole world" (119 Cal. 150) it was held in 156 Cal. 510 that the rights of a grantee in a deed from an heir,

made before distribution conveying his interest in the estate, were paramount and that the decree did not affect rights so acquired, the decree being conclusive as to the right of succession or under a will only.

There is also the decision in 150 Cal. 477 that "a decree of distribution is subject to review in equity upon a showing that it was procured by extrinsic fraud or mistake" and that the distributee became an involuntary trustee against whom the trust could be enforced.

WILL MEASURED BY DECREE:

The rights of the devisees under the will are to be determined and measured by the terms of the judgment and not by the terms of the will. The will cannot be used to impeach the decree (19 Cal. 557). The will may be incorporated in the decree (79 Cal. 613, 119 Cal. 558). Where the decree distributes according to the provisions of the will and so states, the will must be looked to for the purpose of construing the order (177 Cal. 660).

DISTRIBUTION TO HEIRS OF OR GRANTEE OF HEIR:

Court has power to distribute to grantee of heir (93 Cal. 459). Such order may be attacked for fraud (6 Cal. App. 434), as when deed was made to defeat judgment against heir (20 Cal. App. 234). The judgment creditor of heir not being before Court, distributee took subject to the judgment (137 Cal. 354). Such decree is not estoppel against equitable claimants (133 Cal. 489). The court cannot litigate validity of the conveyance (161 Cal. 152, 53 C. D. 417).

An assignment executed and filed before distribution operates as a transfer of all interest of an heir at law in the estate (Est. of Hayne, 165 Cal. 568). The instrument of transfer should be filed in the Recorder's office or with the probate papers, but if not then the decree will stand good after 60 days.

Distribution to heirs of a deceased heir held good without administrating estate of latter, finding of heirship having been final. (Warren vs. Ellis, 179 Cal. 544, 167 Cal. 473.)

Distribution to assignee of heir or devisee held ultra vires in 53 Cal. Dec. 417. But 1678 C. C. P. authorizes distribution to grantee under a conveyance (137 Cal. 354, 153 Cal. 489), though a judgment against the original heir will attach.

A devisee dies - on distribution in original estate, Court found the death and determined who were heirs of the deceased heir. No independent proceedings held to be neces-

sary under authority of De Leon estate. (102 Cal. 537.)

Distribution may be made to heirs of deceased spouse by name. (65 Cal. 523.)

When a devisee dies before testator, his lineal descendants take. (1310 C. C. as in effect July 29, 1921.)

ADJUSTMENT AMONG HEIRS:

Probate court has no authority to adjudicate disputed claims among heirs or to deduct from an heir's interest a debt, due decedent. (Estate of Pollito, 51 C. A. R. 752, decided March 17, 1921. Rehearing denied.)

RIGHTS OF LIFE TENANT:

Has no power to consume the principal unless empowered (see Hardy vs. Mayhew, 158 Cal. 95), where "the unused portion" only went to remaindermen and life tenant could therefore consume the corpus.

Is a quasi-trustee for remaindermen. (Perry on Trusts, Sec. 540.)

May make agreement of sale when power of sale is granted if she deposits deed in escrow, because if she die before payments are all made, still the deed when delivered will date back to deposit in escrow. (62 Cal. 496.)

Need not sell for cash unless expressly directed, but consideration must be valuable. (154 Cal. 145.) And may take purchase money mortgage back. (Perry on Trusts, Sec. 786a.)

A decree of distribution to widow for life, remainder to son and daughter, creates a vested remainder, which does not lapse by death of daughter. (Miller vs. Oliver, 35 Cal. App. Dec. 290.)

Upon release of a mortgage by the life tenant, the money may be paid to such tenant without seeing to preservation of the proceeds for the remaindermen. (108 Cal. 463.)

Identity of heirs may be established. (Stat. 1921, p. 988.)

INTEREST ON LEGACY:

Ruling case is 112 Cal. 521, Est. of Williams. Specific legacies are due in one year and bear interest thereafter. The judgment of distribution bars the claim if not previously made. (Est. of Schmirer, 168 Cal. 748.) Simple interest only. (66 Cal. 157.) (See 1369 C. C. and 1368 C. C. for provisions of statute. Also Coffey's Probate Decisions, 6, p. 368.)

OMNIBUS CLAUSE:

Where the decree distributes in addition to property described "any other property not now known or discovered which may belong to said estate or in which said estate may have any interest" the title to property nowhere mentioned in the proceedings as an asset of the estate passes to the distributees named. (154 Cal. 170, 83 Cal. 344.)

PARTIAL DISTRIBUTION:

Can be made only on petition of an heir or devisee, the executor or administrator cannot ask for it. (74 Cal. 311, 133 Cal. 655.)

LAWS OF SUCCESSION:

For statement as to the heirs of a decedent and their respective interests, see 1386 C. C.

PROOF OF DEATH:

This may be proved in three ways:

(a) Prior to 1905, Sec. 3074 et seq. of the Political Code provided that certificates of death filed by undertakers and others were good evidence of the facts stated. The laws were amended in 1905 making the filing of such certificates impossible and in that year (Stat. 1905, pages 105 and 115) a State Registrar was appointed at Sacramento and local registrars of vital statistics were also appointed for each county and for each charter-governed city, and under this act a certificate from the registrar was made evidence of death and could be accepted as such. By the amendment of 1911, the certificate of the local registrar was also made legal evidence. This act is very insistent upon the regularity of the certificate as to form and provides that no certificate shall be held to be complete and correct that does not supply all of the items specified as being necessary or satisfactorily account for the omission thereof. A new Vital Statistics Act, No. 4302, approved May 19, 1915, repeals prior act and creates State and local registrars of vital statistics. Under this act, the recorder of each county and the health officer in cities operating under a free-holders' charter and the clerk of other cities are made local registrars. Section 7 of the act prescribes what the death certificate must contain and Sec. 18 provides that only official blanks or forms shall be used. Under Sec. 21, a copy of the record, properly certified, is made prima facie evidence in all courts and places of the facts therein stated.

Practically a new act came into effect July 27, 1917, which materially alters the old acts and under this new act

the following appear to be the chief items worthy of note:

State Board of Health to maintain a bureau of vital statistics directed by a State Registrar.

The State is divided into registration districts as follows:

Each city and county, city and incorporated town is a primary registration district, each county outside of above may be subdivided by the State Registrar into primary rural registration districts.

The clerk of each city and county, city and incorporated town is local registrar, provided that in the cities with freeholders' charter, the health officer may act as local registrar. The State Registrar with approval of State Board shall appoint a registrar for each primary rural district for term of four years. Each local registrar to appoint a deputy. Local rural registrars to send copies to County Recorder of their records. Local registrars, with approval of State Board, may appoint sub-registrars when necessary.

Sets out requirements (20 items) in full of death certificates and provides that all items are necessary for legal registration records.

State Registrar to prepare blanks and no other forms to be used.

State or local registrars to supply to any applicant a certified copy of the record for fifty cents and same, properly certified, shall be prima facie evidence in all courts and places of the facts therein stated.

(b) Proof of death may be considered to be properly established also by the facts that letters testamentary or of administration have issued in a probate proceeding upon the estate of decedent although the property under search is not mentioned therein. The identity of the decedent with the person to be proved dead should be established by affidavit.

(c) Sec. 1723 C. C. P. was enacted for the purpose of proving death. It could do not more prior to 1921 than establish decease. Property owned of record by a married woman under 164 C. C. could not be found to be community property and therefore vested in her husband upon her death. The court cannot try the title. (136 Cal. 385, 148 Cal. 157.)

The amendment of 1921 became effective July 29, 1921. The amendment purports to confer jurisdiction upon the court to vest title to homestead property and community property.

When the fee title to homestead property vested in the deceased spouse, or where the title to community property is concerned, a judgment rendered pursuant to said section as amended, and purporting to vest title to such homestead property in the surviving spouse or purporting to vest title to community property in the surviving husband, should not be construed as valid unless an administrator or executor has been duly appointed to represent the estate of the deceased spouse and service shall have been duly made upon such representative as provided for by said amended section. However, such proceedings will be deemed sufficient in the event that the estate of such deceased person has been duly administered upon by the probate court, decree of distribution with omnibus clause having been rendered therein and the residuary distributee under such omnibus clause having been duly served with notice of the proceedings as required by said amended section.

Sec. 1723 C. C. P. has the advantage in that it covers proof of death out of the State, which the California Vital Statistics Act does not, and it settles also the question of any inheritance tax which may attach if the interest presumed to pass by the death comes within the purview of the act.

AFFIDAVIT:

A good form to use to establish identity of decedent with person in search is as follows: It should be adapted to suit the particular circumstances of each case and recorded.

State of California,)
County of .....) ss

John Doe, a resident of said county, of legal age, being first duly sworn, does depose and say:

I was well and personally acquainted with..... in his lifetime, being his (brother-in-law, or neighbor, or state source of intimacy), and know him to be the grantee in a certain deed dated (describe deed) conveying property known as (describe property), and I know him to be the same person mentioned in a certain Declaration of Homestead made by..... as his wife, recorded.....in book....., p..... of homesteads; I further declare that said.....died on or about.....at.....in said county and is the same identical person referred to in the certificate of death (hereto attached, or recorded in Recorder's office) and left surviving him his said wife.....

.....

Subscribed and sworn to before me, this.....day of....., 1916.

.....

Notary Public in and for the said County of....., State of California.
(N. P. Seal)

INHERITANCE TAX

Succession is a privilege and taxable by the power that grants it as distinguished from an executed grant which is property, a right protected by constitutional guarantees. (Garms Est., 162 Pac. 639.) The tax is a vested right which the State cannot waive. (Est. of Lander, 5 App. 573.)

STATE TAX:

Original Act 1893 applying only to collateral heirs. Amended in 1905 to apply to direct heirs. By amendments of 1911 and 1913 exemptions were raised and rates reclassified. Annual revenue from this tax is between 3½ and 4 million dollars, a portion going to support of schools, balance to the State. In 1915 rates were increased. In 1917 the wife's half of the community property was exempted, prior to which the husband paid no tax on his own interest or on that vested in him by his wife's death. The State Controller maintains offices at Sacramento, San Francisco, and Los Angeles, with tax attorneys in charge with appraisers in each county of the State, one of whom must be appointed in probate court appraisements. The tax is upon the "clear market value" of the property of the decedent, from which is deducted expenses of last illness and funeral, legal claims against the estate, taxes, attorney's fees, commissions of administrator and fees.

To secure uniform operation this tax falls on all property which passes to its recipients by reason of its former owner's death whether it goes through the probate court or not, and includes transfers made without consideration and deeds made to avoid administration in court.

The tax is graduated according to relationship and value. Exemptions are allowed to widow or minor child, $24,000.00; to husband, lineal issue and ancestor or adopted child, $10,000.00; to brother, sister, daughter of either, wife or widow of son, husband of daughter, $2,000; uncle, aunt or descendants of either, $1,000; others as specified, $500.

Stock in California corporations owned by non-resident decedents is taxable, such as Standard Oil Company of California, which is held 90 per cent by non-residents; the estates of Harkness, Flagler & Archbold paid over 1½ millions to the State in inheritance taxes.

As to whether a transfer by deed is subject to the tax, the date of delivery governs. (170 Pac. 402, 162 Pac. 639.) The tax follows "transfer by the homestead laws" or any probate homestead set apart.

By the amendment in effect July 29, 1921, the line of the tax follows the proceeds instead of the property sold.

WIFE'S SHARE OF COMMUNITY PROPERTY LIABLE FOR TAX:

The surviving wife's share of the community property of herself and her deceased husband is subject to the payment of the inheritance tax imposed by the Act of March 20, 1905, etc. (Est. of Moffitt, 153 Cal. 359.)

Use this form, adapted to suit, in case of a deed under suspicion of liability:

Any lien for inheritance tax due the State of California, a deed from .....to....., his wife, having been recorded after the death of the grantor.

FEDERAL ESTATE TAX:

Effective September 9, 1916, amended March 3, 1917.

This tax is levied by the Federal Government on the gross estate of decedent in excess of $50,000.00 and also attaches to property transferred within two years of death without consideration, trusts and transfers made in contemplation of death, interests in joint tenancies, joint bank accounts, half value of community property, and assets generally. Statements must be filed by the administrator, or any person coming into possession, with the Collector of Internal Revenue of the District in which decedent was a resident. The tax is due one year from death; if paid before, 5% is allowed; if after 90 days, 10% is added. If the exact tax cannot be determined, a sum sufficient in the opinion of the Collector to cover shall be accepted, subject to further demand or rebate. Unpaid tax remains a lien for 10 years and follows property into the hands of distributees and purchasers.

A mortgage unpaid at death is superior to the tax which affects the equity, but the tax is superior to a mortgage made under court order by the administrator.

Close watch must be kept as to property in this State owned by non-resident whose main estate is elsewhere and is subject to the tax.

FORMS OF EXCEPTIONS FOR REPORTS AND POLICIES TO BE ADAPTED TO INDIVIDUAL CASES:

Any lien for inheritance tax that may be claimed as due the State of California by reason of the deed from ..... to....., recorded after the death of the grantor being subject to the inheritance tax laws.

Any lien for inheritance tax due the State of California, by reason of the distribution of said property out

of the estate of....., deceased. (Case No..... Probate.)

Any lien for federal inheritance tax due upon the estate of....., deceased (case No..... probate), this property having been distributed (or sold) out of said estate and no payment of said tax being shown.

FORMS FOR VESTING

If property under search constitutes part of the estate of a decedent, vest in

(a) "The heirs or devisees of....., deceased, subject to the administration of the estate of said decedent."

If there is a will duly admitted to probate, vest in

(b) "The devisees of....., deceased, subject to the administration of the estate of said decedent."

If deceased died intestate, vest in

(c) "The heirs of....., deceased, subject to the administration of the estate of said decedent."

If title is in a minor, vest in

(d) "....., a minor."

If title is in an incompetent, vest in

(e) "....., an incompetent person."

If the court has made an order of sale or an order confirming the sale, but no deed has been issued, make the vesting subject to such an order, using this form attached to the above:

(f) "Subject to an order confirming a sale of said property to....., made by..... administrator (or executor) of said estate, issued out of the Superior Court of said County.....19..... , recorded in book ....., page.....of deeds. See probate case No....."

With each of the foregoing vestings an appropriate note should be made, following the description, to inform the customer more fully about the proceedings, to this effect:

(g) "NOTE: Proceedings had in the matter of the estate of....., deceased, show that said decedent died testate (or intestate) on....., 19....., and that..... is the duly appointed and qualified executor of the will of said decedent (or administrator of the estate of said decedent). Case No..... probate, Superior Court."

A somewhat similar note should be made in the case of guardianship. If the deceased person was a mortgagee in an existing mortgage the note should follow the mortgage.

WHERE ESTATE OF STRANGER CLAIMS TITLE:

It sometimes happens that property under search is included in the estate of a stranger to the title. He may have an interest under an unrecorded contract or be in possession. Use this form:

(h) "NOTE: The inventory in the estate of....., deceased, shows that the property herein described is claimed as an asset of said estate. At the date of the filing of said inventory, to-wit, ..., said decedent had no record interest in this property nor has any since been acquired. No further examination has been made of this estate. See Case No. ..... probate, Superior Court."

FOREIGN PROBATE, PRESUMPTION OF REGULARITY:

When decedent died in some outside county and a copy of the decree of distribution only is found of record, add this note, adapted to suit:

(i) "NOTE: This guarantee is written upon the presumption that the proceedings had in the Superior Court of the State of California in and for the County of....., in the matter of the estate of ....., deceased (Case No. .....), leading up to and including the decree of distribution had therein, are legal and regular. A certified copy of said decree is recorded in book....., page....., of deeds."

RIGHTS OF MARRIED WOMEN TO COMMUNITY PROPERTY:

Under Secs. 1401 and 1402 C. C. in effect August 17, 1923.

SEC. 1401, embodies the following new features as to the disposition of community property upon the death of either spouse:

1. Upon the death of husband or wife, one-half of the community property belongs to the surviving spouse.

2. The wife has power to will one-half of the community property upon her death prior to her husband.

3. If the wife dies first intestate, one-half of the community property belongs to the husband and the other half goes to him.

4. If the husband dies first intestate, one-half of the community property belongs to the wife and the other half goes to her.

SEC. 1402, provides that community property passing from the control of the husband by his death or under the wife's will is subject to administration, his debts, family allowance, charges and expenses of administration; if the wife exercises her right to will, the husband, pending administration, retains the same power to deal with the community personal property as he had in her lifetime and the wife's executor only controls community property to the extent necessary to effectuate the will.

After 40 days from the wife's death the husband has full power to deal with and dispose of the community real property unless a notice is recorded in the county where the property is situated that an interest in it is claimed by another under the wife's will.

Until the Supreme Court has passed upon these laws and has upheld and construed their effect, title men in issuing their evidence of title can only feel safe by protecting themselves against any possible contingency that may arise in their application.

The most vital question is probably that as to whether the Legislature has the power to give to one person the power to will away the property of another, for no change has been made in the law which vests the title to community property in the husband and gives the wife her half on his decease as an heir, that is, she has no present vested interest in the community real property and the husband would be deprived of his vested interest without due process of law. Louisiana and California appear to be the only States that deny to the wife a vested interest in the community property, but the Louisiana law allows either husband or wife to dispose of one-half of the community property by will. It also is argued that the Legislature in vesting title to the community property in the husband has the inherent power also to vest it subject to the power of the wife to will it.

LAW NOT RETROACTIVE:

It is conceded by most title men that under the cases of Spreckels vs. Spreckels (172 Cal. 775), Roberts vs. Wehmeyer (66 C. D. 177) and others that the wife's right to will applies only to community property purchased with community funds acquired subsequent to August 17, 1923. The new law is not retroactive and does not affect property acquired prior to August 17, 1923, or acquired after said date with community funds acquired prior thereto.

SEC. 1401 A STATUTE OF DESCENT:

This section as amended may safely be taken as a rule of succession. It is competent for the Legislature to change the rule of inheritance at any time. (Est. of Packer, 125 Cal. 396, Est. of Parker, 129 Cal. 80.) The law in effect at time of death governs. This section applies therefore to all community property acquired prior to Aug. 17, 1923, when death occurs thereafter.

SEC. 1402 THE FORTY-DAY PERIOD:

For 40 days after the death of the wife the husband cannot deal with the community real property. Thereafter he has full power to sell, lease, mortgage or dispose of it, unless the notice of another's interest is recorded. There is no provision as to who shall record this notice. Anyone might do it. If such a notice is recorded no title can be passed until the adverse claim has been adjudicated in court. If no notice has been filed, the wife may nevertheless have made a will and transferred title thereunder to her devisees. Before a deed is passed from the surviving husband depriving these devisees of their vested interest, affidavits should be secured from the husband and the purchaser or encumbrancer showing innocence and good consideration and the title company be thoroughly satisfied that the wife did in fact die intestate. Whether the records alone can be relied on is problematical in view of possible vested rights.

HUSBAND'S PERSONAL PROPERTY RIGHTS:

Under 1402 C. C. the husband, pending administration of the wife's estate, is given the same power to deal with community personal property as he had in her lifetime. This affects especially mortgages or trust deed notes calling for release or discharge. The wife's executor should be required to join in a release or satisfaction where possible or the funds could be impounded in case of dispute and the lien discharged.

NECESSITY FOR ADMINISTRATION:

As title is vested in the husband there must always be an administration of his estate when he dies. When the wife dies no administration is necessary of community property standing in the husband's name unless she has made a will and then as to one-half only or such portion of said half she has taken out of her husband's control by testamentary disposition. When she has made no will her death can be established of record as shown under "Estates".

LIABILITY FOR DEBTS:

The language of the statute is not entirely clear, but an expression of opinion adopted by the banks in the south part of the State is as follows:

One-half of the community property over which the wife has testamentary disposition is subject to the community debts, debts contracted by the husband prior to her death, to her debts contracted before marriage and to debts contracted by her after marriage for necessaries in case of the husband's neglect.

SALE BY WIFE'S EXECUTOR OR DISTRIBUTEES:

The executor's deed should not be passed as sufficient unless the husband also gives a deed for all his interest in the property.

The same rule applies to distributees of the wife's estate. The husband must join in the deed or give a separate deed to cover any interest he may have or claim.

SAFETY FIRST:

All questions in doubt as a result of the effect of these statutes should be referred to counsel and considered on their individual merits. The interest of customer and title man must be safeguarded against any final construction that may be put upon these laws in the litigation. They are almost certain to engender.

ESTATES ADDENDA

LETTERS TO PETITIONER ONLY:

Letters of administration issued to person other than petitioner are void. (52 Cal. 658.)

ADMINISTRATION OF COMMUNITY PROPERTY:

The probate court has jurisdiction to administer upon the community property as part of the assets of the husband, and the wife takes her interest in such property by way of succession from the husband and through distribution of his estate. (Estate of Burdick, 112 Cal. 387.)

When a man dies possessing both separate and community property, both pass into his estate for the purposes of administration. Where a wife dies, no administration at all is to be had upon any but her separate property. (Estate of Young, 123 Cal. 337.)

Wife takes title. Husband dies. Wife treats property as asset of his estate. Court has jurisdiction and wife is estopped after distribution. (Estate of Simonton, 190 Pac. 442.)

(End of Subject.)

HOMESTEADS

NOT AN ENCUMBRANCE:

A declaration of homestead is not an encumbrance, but affects the quality of the tenure and protects the property from execution or forced sale as provided by the statute which creates it and which must be followed strictly to maintain it.

RECORDED DECLARATION NOT PROOF OF FACTS:

The recitals in the Declaration are not constructive notice of the facts set out. (102 Cal. 493.)

"A valid homestead and a valid declaration of homestead are entirely different." The recitals in a declaration of homestead are mere ex parte statements and are not legitimate proof of the truth of the facts recited. (Apprate vs. Faure, 121 Cal. 466.)

WHAT CONSISTS OF:

The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated. (1237 C. C.) As to use of the homestead for business purposes see 105 Cal. 99, 103 Cal. 264, 78 Cal. 293 and 483. Water appurtenant to land is included in the declaration. (156 Cal. 195.)

WHO MAY CLAIM HOMESTEAD:

A homestead may be claimed (1260 C. C.) either by

(a) The head of a family of value not exceeding $5000;
(b) other than the head of a family of value not exceeding $1000.

RECORDING IN TWO COUNTIES:

The declaration may be made in duplicate and recorded in two counties where the land lies in both. (98 Cal. 143.)

VALUE, HOW ESTIMATED:

The amount of exemption is based on the value of the fee and not on the equity after deducting encumbrances. (122 Cal. 329, 62 Cal. 286, 62 Cal. 125.)

On ceasing to be the head of a family, the homestead exemption is reduced to $1000.00 (86 Cal. 141, 118 Cal. 299), but value of exemption is not changed by death (18 Cal. 299).

STATUTORY REQUIREMENTS OF DECLARATION:

The declaration by the head of a family (who is defined in 1261 C. C.) must contain the following statements (1263 C. C.):

(a) A statement showing that the claimant is the head of the family, or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit.

(b) That the person making it is residing on the premises and claims them as a homestead.

(c) A description of the premises (such as would be good in a deed).

(d) An estimate of their actual cash value.

The declaration of a person not the head of a family must contain the statements covered by (b), (c) and (d) above.

The omission of any of the above requirements is fatal, and the homestead declaration is void and of no effect. (54 Cal. 616.)

By the amendment passed March 21, 1905, every declaration of homestead made by one spouse must disclose the name of the other spouse.

The statement in a declaration of homestead "that I am married" has been held not to be a compliance with the requirement of Sec. 1263, C. C., to-wit: "A statement that the person making it is the head of a family." (126 Cal. 527.)

Prior to July 1st, 1874, it was not necessary that the wife's declaration state that her husband has not made a declaration of a homestead. (Sec. 1263 C. C., Amdts. of 1873-4, pp. 231 and 269.)

Prior to January 1st, 1873, it was not necessary to state the value of the homestead in the declaration. (Stat. 1872, p. 239.)

Prior to 1860 no declaration was required to be recorded, only residence was necessary for a valid homestead. (Noble vs. Hook, 24 Cal. 633.)

DATE:

There is but one material date to the declaration, that of recordation.

WHAT PROPERTY SELECTED FROM:

The homestead may be selected by either spouse from the community property, or from the separate property of the husband, but cannot be selected from the separate property of the wife without her consent, which must be shown by her making or joining in making the declaration of homestead.

ON EQUITABLE INTEREST:

A homestead may be declared on an equitable interest in land (104 Cal. 15), such as possession under an agreement to convey, or on a mining claim (98 Cal. 472).

BY ONE COTENANT, INVALID:

A homestead cannot be created by a cotenant in lands held under a tenancy in common. (148 Cal. 548, 153 Cal. 781, 110 Cal. 198.) The Act of 1868 provided that parties owning an undivided interest, but having exclusive possession, should be entitled to the benefit of the law relating to homesteads. Both this act and the prior law are now superseded by the provision of the Civil Code, Secs. 1237 to 1269. Unless land is impressed with the characteristics of a homestead at the time of filing the declaration, it cannot become a homestead by any subsequent act of a third party or by a subsequent conveyance from a cotenant to her husband. (110 Cal. 203 and 6 Cal. 165.)

ON PROPERTY HELD IN JOINT TENANCY:

A homestead declared by the husband on land held in joint tenancy was decreed to be void in Swan vs. Walden, 156 Cal. 195 (and see Est. of Carragher, 58 Cal. Dec. 115 of 8-8-19 and 159 Cal. 98), but it may be declared by the wife on the theory that she has power to impose a homestead on her own property and on that of her husband. It is invalid if declared on land held by husband or wife or both in joint tenancy or in tenancy in common with a third person.

ONLY ONE HOMESTEAD VALID:

A person can have only one valid homestead at one time. (74 Cal. 266.) If two should appear of record and no deed out by declarant, show both, one at least is void. It is a question of fact.

FORM FOR DECLARATION BY HUSBAND AND WIFE:

KNOW ALL MEN BY THESE PRESENTS: That we, ... and ..... do hereby make known and declare that we are husband and wife and that..... is the head of the family, to-wit: That

certain family consisting of himself, his wife....., and one child (or children, as the case may be), namely..... ..... and we do hereby further certify that at the time of making this declaration we actually reside as a family on the land and premises hereinafter described, to-wit: That certain tract of land lying and being in the.....County of..... State of California, particularly described as follows:

(Here insert legal description)

That it is our intention to use the said lot of land and premises above described, together with the dwelling house thereon and its appurtenances, as a homestead, and we do hereby select and claim the same as a homestead.

We further declare that neither of us has heretofore made a declaration of homestead, and we therefore make this declaration for our joint benefit. The actual cash value of said premises we estimate to be $.....

IN WITNESS WHEREOF we have hereunto set our hands this.....day of.....19.....

HOMESTEAD ON REGISTERED LAND:

The method of declaration is governed by 1262 et seq. C. C., which insists on filing with the recorder, after which the land is a homestead (1269 C. C.). This is a condition precedent (54 Cal. 616, 102 Cal. 493, 91 Cal. 94). The Torrens Act does not expressly refer to the creation of homesteads; it speaks of homesteads already created in Secs. 5 and 56, but contains nothing repealing the code provision requiring recordation in former way.

HOMESTEAD OF BANKRUPT:

Under the State Insolvency Act of 1880, the court on application, no homestead having been declared and recorded, could set aside a homestead for the insolvent.

The declared homestead cannot be set aside in estate or insolvency proceedings if its value exceeds $5,000.00. (86 Cal. 141, 118 Cal. 299.)

JUDGMENT LIENS

The homestead is subject to execution or forced sale in satisfaction of judgments obtained. (Sec. 1241 C. C.)

(a) Before the declaration of homestead was filed for record.

(b) On debts secured by mechanics' liens, laborers' or vendors' liens upon the premises.

(c) On debts secured by mortgages on the premises executed and acknowledged by the husband and wife, or by an unmarried claimant.

(d) On debts secured by mortgages on the premises executed and recorded before the declaration of homestead was filed for record.

DEFEATS ATTACHMENT:

If an attachment is levied upon the property and a declaration of homestead is filed before judgment is obtained in the suit in which the attachment was issued, the homestead defeats the judgment and the judgment is not a lien on the premises described in the homestead declaration and provided the statements in the declaration are true. (54 Cal. 81.)

DEFEATS JUDGMENT NOT DOCKETED:

A judgment is not a lien if docketed after recording the homestead declaration, altho the action is already started against the claimant. (121 Cal. 582.)

MAY DEFEAT EXECUTION FROM J. P. COURT:

A homestead defeats an execution from a justice's court unless an abstract of the judgment is filed in the County Recorder's office. (111 Cal. 484.)

DEFEATS UNRECORDED MORTGAGE:

Homestead defeats unrecorded mortgage even tho declarant had actual notice of it. The rights under a homestead being statutory, actual notice is immaterial. (119 Cal. 364.)

JUDGMENT AGAINST EXCESS OF CODE VALUE:

Property covered by a valid declaration of homestead is, REGARDLESS OF ITS VALUE, not subject to the lien of a judgment.

While the excess above the statutory homestead valuation may be reached by a judgment creditor by proceedings

under section 1245 et seq. of the Civil Code, there is no judgment lien as to such excess, and the judgment creditors' right to subject such excess to the satisfaction of his judgment is initiated by and finds its sole basis in the levy of execution provided for by Sec. 1245 of the Civil Code. (Boggs vs. Dunn, 160 Cal. 283, 82 Cal. 226, 85 Cal. 71.)

DEED AND DECLARATION RECORDED TOGETHER DEFEAT JUDGMENT:

A deed to husband and wife was filed for record concurrently with a declaration of homestead. It was held to be one transaction and sufficient to defeat the lien of a prior judgment in Eby vs. Foster (61 Cal. 282).

PROCEEDS OF SALE EXEMPT:

The escrow man should remember that if homesteaded property is sold and deeded, the proceeds up to the statutory value allowed are exempt from execution for six months. (1265 C. C.)

SEARCHER MUST NOT IGNORE JUDGMENTS:

Altho property searched is covered by a homestead declaration it is entirely unsafe to ignore judgments subsequently docketed. This is because it is impossible to learn from the records whether the homestead is in fact valid. Proceed as tho there were no homestead and show the judgments as encumbrances qualified with a notation that they cannot be maintained as valid liens if the statements in the declaration are true.

HOW CONVEYED OR ENCUMBERED:

To convey or encumber the homestead of a married person, both husband and wife must join in the same instrument (1242 C. C.). Instruments executed separately are void. Subsequent abandonment does not validate a former deed (100 Cal. 296, 81 Cal. 214). The execution and acknowledgment must be personal. It cannot be done by an attorney-in-fact or the acknowledgment proven by a subscribing witness. The sole exception is a deed from one spouse to the other, which is valid (78 Cal. 310), and vests the title in the grantee as his or her separate property. The property still remains a homestead and can only be conveyed or encumbered by the joint act of both spouses.

MORTGAGE IN ESCROW:

If the mortgage is handled thru escrow the check should be made payable to both and instructions regarding the proceeds should be signed by both spouses.

To be valid, the loan must inure to the benefit of both spouses. If the proceeds were paid to the husband alone, it might be possible for the wife in a foreclosure suit to set up the defense that she got no benefit and her homestead rights in the property were intact, or that the loan was consumed by the husband to pay his separate debts.

Some banks require abandonment of homestead as prerequisite to a loan. In such a case the abandonment should be of record before the new mortgage is dated.

RIGHTS OF WIFE UNDER MORTGAGE:

The mortgage must be joint and concurrent (126 Cal. 471). The wife takes such an interest in a homestead upon the husband's separate property that she must be made a party to the foreclosure of a mortgage given prior to the homestead declaration.

THE WIFE IS ENTITLED TO REDEEM AFTER FORECLOSURE (97 Cal. 48):

Held not to defeat lien of mortgage for purchase money where renewal was had and wife did not join in the new mortgage. It was a new form of the old security. (109 Cal. 65.)

If a person owns a homestead either single or as survivor of a deceased spouse and then marries, the new husband or wife has no homestead interest in the property and is not a necessary party to a deed of mortgage thereof. (Graham vs. Stewart, 68 Cal. 374; Dickey vs. Gibson, 113 Cal. 26.)

MORTGAGE FROM ONE SPOUSE TO THE OTHER:

A mortgage given by the husband to the wife covering the homestead is void. (130 Cal. 392.)

HOMESTEAD OF INSANE PERSON:

A method of selling or mortgaging the homestead of an insane person was provided in 1905 under Sec. 1269 a, b and c, C. C. (58 Pac. 311.)

PRESENTATION OF ENCUMBRANCES ON DEATH:

A deed of trust is not a lien requiring presentation; sale by the trustees upon default extinguished the homestead. (149 Cal. 316.)

If one spouse dies and the property goes to the survivor, claims against the homestead must be paid out of the assets of the estate. (1475 C. C. P.) In McGahy vs. Forrest (10 Cal. 63) the owner of a note and mortgage failed to present his claim to the administrator and lost his lien. This section has been amended to the effect that the administrator

must now notify in writing the record owner of any lien on the homestead property and unless so notified his rights are not jeopardized by failure to present his claim. This does not apply to a probate homestead.

HOW ABANDONED:

A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged. (1243 C. C.)

(a) By the husband and wife if the claimant is married.

(b) By the claimant, if unmarried.

The abandonment is effectual only from the time it is filed in the office in which the homestead is recorded.

CHANGE OF RESIDENCE DOES NOT ABANDON:

Abandonment of homestead must be made only as statute provides; ceasing to use a residence or moving to new homes does not legally abandon homestead. (121 Cal. 582.)

UNRECORDED ABANDONMENT NOT EFFECTIVE:

An unrecorded abandonment held off records till one spouse dies is ineffective. (95 Cal. 405.)

ADVERSE POSSESSION BY STRANGER:

A homestead is extinguished by adverse possession. (82 Cal. 72, 67 Cal. 387.)

TRUST DEED DOES NOT ABANDON:

Abandonment of homestead rights in a deed of trust given to secure money is not an absolute abandonment. (1 Cal. Dec. 555, McLeod vs. Moran.)

SEPARATION AGREEMENT ABANDONS:

A homestead may be abandoned by an agreement between husband and wife for separation or for property settlement. (121 Cal. 92, 78 Cal. 310.)

DEED AS MORTGAGE DOES NOT ABANDON:

A deed which is in fact a mortgage does not IN FACT abandon the homestead (98 Cal. 143) except as to innocent parties presuming on the records.

QUITCLAIM DEED SUFFICIENT:

A quitclaim deed executed by both spouses is suf-

ficient to abandon homestead. (93 Cal. 664.)

SUBDIVISION OF HOMESTEAD PROPERTY:

The platting and subdivision of homestead property does not of necessity invalidate the homestead. The records will not disclose facts sufficient to decide the question. It is well to advise an abandonment of all lots not claimed as part of the actual homestead and as to which it is of doubtful validity.

HOMESTEAD IN DIVORCE PROCEEDINGS:

If the homestead is awarded to either party it retains its homestead character till the final decree. The interlocutory decree cannot destroy the homestead. The final decree may destroy the homestead (165 Cal. 31). An agreement settling property rights where divorce was granted and no property adjudication made was sufficient to abandon the homestead in 78 Cal. 310 and 121 Cal. 92, but a homestead declared by a married woman on her separate property was not affected where a divorce was obtained by the husband and the pleadings and decree were silent (111 Cal. 482). An agreement settling property rights between the spouses and for separation if aptly drawn abandons the homestead (121 Cal. 92). The court in a decree of divorce may set apart the separate property of the husband, claimed as a homestead by the wife, for a limited period only, or may render judgment for permanent alimony in lieu of homestead (117 Cal. 407, 124 Cal. 583). A homestead set apart in divorce suit to wife in trust for herself and minor children held to be a fee simple (80 Cal. 237).

No general rule can be laid down by which the effect of divorce on the homestead can be measured. The advice of counsel should be sought in all doubtful cases.

PROBATE HOMESTEADS

DEFINED:

A probate homestead is one set apart by order of court in a probate proceeding where no homestead had been declared in the lifetime of the decedent (1465 C. C. P.). The order is a judgment in rem (114 Cal. 690, 147 Cal. 124). Existing liens are not impaired (50 Cal. 544) and recording a copy of the order is not essential to its validity (144 Cal. 144). No interest is acquired in the property as a homestead that can be conveyed until the court makes the order (57 Cal. 437, 63 Cal. 361, 100 Cal. 425), but after entry of order surviving spouse (104 Cal. 94) or minors by their guardian and under order of court (120 Cal. 421) may sell or encumber. For the vesting of title upon creation of a probate homestead Secs. 1465 and 1468 C. C. P. must be construed together. The word

"family" means wife or husband or minor children, if any, and no act of one can prejudice the rights of the others to occupy the homestead premises (100 Cal. 158). The property loses its homestead character as each minor reaches majority and as to his interest only (125 Cal. 90, and cases quoted above). It cannot be destroyed till all the minors attain majority (104 Cal. 94, 126 Cal. 576, 120 Cal. 428).

A probate homestead set aside to the widow absolutely out of the SEPARATE property of the husband was held good and the order not void, after time for appeal had expired (127 Cal. 275).

A GOOD FORM FOR VESTING A PROBATE HOMESTEAD FOLLOWS:

> "Jane Doe, a widow, an undivided half and in Richard Doe and Mary Doe, minors, each an undivided quarter, as a Probate Homestead set apart to them by order made..... out of the Estate of John Doe, deceased (Probate Case No.....Superior Court), a certified copy of said order being recorded in Book..... page.....of Homesteads (or Official Records) in the County."

WIDOW'S RIGHTS UNDER 1469 C. C. P.:

The fact that property is a homestead does not prevent the court setting it aside to the widow under 1469 C. C. P. (See Est. of Neff, 25 C. D. 519), but this is not a probate homestead.

NEGLECT TO ADMINISTER:

Neglect to administer estate of decedent does not impair the rights of the surviving spouse in the homestead. It is not any part of the estate (88 Pac. 608). An order setting apart a probate homestead does not affect the original declaration; it only takes the property out of administration (144 Cal. 650, 123 Cal. 337).

PROBATE HOMESTEAD EXEMPT FROM LIENS:

A probate homestead is exempt from liens the same as a selected homestead (100 Cal. 322).

PROBATE HOMESTEADS EXPLAINED:

For a good dissertation on probate homesteads in general see 121 Cal. 647.

RIGHTS OF WIDOW IN PROBATE HOMESTEAD:

The widow, when owner of an undivided half in a pro-

bate homestead, may mortgage or convey her interest subject to the homestead quality of the premises (104 Cal. 94, see 133 Cal. 99). As the minor children reach majority, their interest in the homestead (as a homestead) ceases, for they are no longer part of the family and their individual interest vests in them as remaindermen or reversioners. The widow, if living, is the only claimant left and her homestead right remains while she can assert it (125 Cal. 90).

In Otto vs. Long (28 Cal. 119) a homestead set aside in probate was declared to be not void altho the decedent had another homestead. The fee in remainder after the termination of a probate homestead can be sold to pay debts (139 Cal. 149). A probate homestead cannot be set off to the widow by the court after her remarriage; she is no longer within the code provisions (43 Cal. 641, 117 Cal. 509, 123 Cal. 466), and the right is lost to a minor child if he waits till his majority (Est. of Harwood, 31 Cal. Dec. 381).

ORDER EFFECTIVE WHEN:

The order setting aside the homestead is effective from its date, not from its entry (144 Cal. 144).

In general, a homestead set apart for the widow and family in a probate proceeding prevails over a former deed made by the widow (100 Cal. 158 and 425, 120 Cal. 428, 104 Cal. 94). It is exempt from the prior debts of either spouse (100 Cal. 322) and is unlimited as to value (99 Cal. 449, 141 Cal. 646, 81 Cal. 579, 128 Cal. 380). It can be only set apart out of land which could have been dedicated by a declared homestead (80 Cal. 208) and not out of unoccupied land (134 Cal. 96).

VESTING ON DEATH OF SPOUSE:

If the homestead was selected by either husband or wife from the community property or from the separate property of the husband or wife selecting or joining in the selection of the same, it vests absolutely in the survivor. (Sec. 1474, C. C. P.)

PROOF OF DEATH:

There are several ways in which the death of the spouse not owning of record the land impressed with the homestead may be proved.

(a) Probate proceedings in regard to other property.

(b) The special proceeding for that purpose under Sec. 1723, C. C. P.

(c) The provisions of the Vital Statistics Act (Stat. 1917, Chap. 548) under which the certificate of the Registrar of Births and Deaths or his deputies and appointees is made legal evidence of the facts stated. A certified copy of the death certificate can be obtained for the fee of 50 cents and should be recorded with an affidavit establishing identity.

PROBATE COURT CANNOT TRY TITLE:

Proof of death is not sufficient where the spouse owning the record title dies. Title passes to the survivor only if the homestead is in fact valid and neither the records nor the probate court directly can prove this fact. The court is given the power to cut the homestead out of administration proceedings in certain cases. (1465 C. C. P. et seq.)

(End of Subject)

HUSBAND AND WIFE

GENERAL PROVISIONS OF THE LAW:

Before admission to Statehood the civil law of Spain and of Mexico governed the property rights, title and tenure of married persons and the main features of this law were early adopted by the State in its enactment of the Community Property Law which, with its various amendments, now governs the property relationship of the spouses.

Similar laws, modified by individual State statutes, exist in the States of Louisiana, New Mexico, Arizona, Texas, Washington, Nevada and Idaho.

Estates by the entireties, of dower and by the courtesy are entirely foreign to California law.

MUTUAL RIGHTS AND OBLIGATIONS:

The husband is the head of the family. He may choose the domicile and the wife must live there.

Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling. Either spouse may enter into any transaction with the other, or with any other person, as if unmarried.

The Supreme Court ruled in Fay vs. Fay (165 Cal. 469) that husband and wife are at liberty under our law "to change by contract the character of their property from community to separate if they see fit to do so." Marriage settlements and ante-nuptial agreements are lawful. By mutual agreement either spouse may relinquish his or her interest, both present and future, in the property of the other. (148 Cal. 233, 73 Cal. 583.)

They cannot by any contract alter their legal relation to each other except as to property, but they may make a valid agreement in writing to separate and live apart. (159 C. C.)

The wife must support the husband out of her separate property if he has none, or out of the community, if unable to support himself.

DEBTS AS A LIEN:

The community is liable for the debts of the husband whether contracted before or during the marriage. The earnings of the wife are not liable for the debts of the husband. The contracts of the wife after marriage cannot be enforced

against the community property unless the husband has consented to the same. If she makes a mortgage covering the community property not standing of record in her name it could not be foreclosed unless the husband had joined in the instrument. The separate property of either spouse is not liable for the debts of the other, but if the husband fails to support the wife, a person supplying her with necessaries could recover the cost of same from the husband and make good against his property.

MAY HOLD PROPERTY, HOW:

Husband and wife may hold property as joint tenants, as tenants in common or as community property. (161 C. C.)

SEPARATE PROPERTY OF WIFE:

All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. (162 C. C.)

The earnings and accumulations of the wife (and of her minor children living with her), while living apart from her husband, are her separate property.

SEPARATE PROPERTY OF HUSBAND:

All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is his separate property. (163 C. C.)

COMMUNITY PROPERTY:

All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May 19, 1889, the husbands, or their heirs or assigns, of such married women shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: "As to conveyances heretofore made, from and after one year from the date of the taking effect of

this act; and as to conveyances hereafter made, from and after one year from the filing for record in the Recorder's office of such conveyances, respectively." (164 C. C.)

CONTROL OF COMMUNITY PROPERTY:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate."

This was the law from 1850 until June 1, 1891, at which date an amendment (Stat. 1891, p. 425) was made by adding the words: "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife in writing consents thereto." (172 C. C.)

A new section (172-a C. C.) came into force July 27, 1917, as follows:

"The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property, or any interest therein, is leased for a longer period than one year, or is sold, conveyed or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

VESTING OF TITLE:

Under the sections set out above defining the separate and community property of the spouses it appears that:

(a) All property conveyed to a married woman (other than by gift deed or deed from her husband) prior to May 18, 1889, is "presumptively community property" and

(b) Since that date is "presumptively her separate property".

Where the presumption of community property applies, search must be made against the husband also.

If the owner is a woman and acquired the title by deed (other than a gift deed) prior to May 19, 1889, and it does not appear from the deed or other matters in the search that she was a single woman at the date of the deed to her, vest the

title in her, and make the following note after the description:

NOTE: Said.....acquired said property by a bargain and sale (or grant) deed from....., dated .....in Book..... Page..... of Deeds, which does not state whether said grantee was married or single. If she was then married said property is presumptively community property. No examination has been made against her husband, his name not being disclosed by the records.

In this kind of a case, watch for a probate proceeding. The husband may be dead and his estate distributed by omnibus clause not specifically mentioning the premises under search.

Where the presumption of separate property applies vest title in the name of the woman (giving her husband's name when disclosed) "presumptively as her separate property" and add the words "if married" should the marital status of the woman not appear of record. In these cases, a conveyance from her alone is sufficient without her husband joining unless the property is homesteaded and judgments against the husband may be ignored.

NECESSITY FOR JOINDER OF SPOUSE:

The husband must join in all deeds made by married women purporting to convey property acquired by the wife prior to May 19, 1889, unless acquired by a gift deed or deed from her husband. If a deed of community property standing of record in name of married woman is made by a married woman, without her husband joining therein, the husband, or his heirs or assigns will be barred from bringing suit to recover the property, or to show that it was community property one year from the date of filing for record a deed from her, and no suit having been brought prior to that time, this deed may be treated as conclusive. (164 C. C.)

On and after June 1st, 1891, the wife must join in (or otherwise, consent of record to) all deeds conveying community property, except that acquired by the husband prior to June 1, 1891. Prior to June 1st, 1891, the husband's signature alone was sufficient to pass title to all property (not a homestead) standing of record in his name. And his deed alone is still sufficient to convey property acquired by him prior to June 1, 1891, which is not homestead property. See Sec. 172 C. C., wherein amendment of 1891 forbids the husband to give away community property without the written consent of his wife, and see also Spreckels vs. Spreckels (116 Cal. 339), which holds that said amendment cannot be construed retrospectively so as to deprive the husband of his vested right to dispose by gift of community property acquired prior to the amendment and without the consent of the wife. A valuable consideration for the sole deed of the husband is presumed under 1614 C. C.

SOLE DEED BY HUSBAND OF COMMUNITY PROPERTY:

Property acquired by a married woman prior to May 18, 1889, was presumed to be community property. In Jordan vs. Fay (98 Cal. 264) this was declared to be a rule of property and not a rule of evidence. Deed by husband alone after wife's death was held good. But see Ramsdell vs. Fuller (28 Cal. 38), deciding that purchaser from husband, where property stood in name of wife, must ascertain true status of tenure and wife won back her interest by proof it was in fact her separate property.

Before passing such a deed careful enquiry must be made and the facts ascertained as to the true status of the property.

SECTION 172a, C. C.:

This section (in effect July 27, 1917, see ante) changed considerably the husband's right of disposition of property acquired thereafter, either community or presumptively community and taken of record in his name.

This section was decided to apply in no way to property acquired prior to its enactment, in the case of Schubert vs. Lowe (41 C. A. D. 125 on May 4, 1923). The wife's joinder is governed by the date of acquisition. The court cited, in support of its decision, the Spreckels case (116 Cal. 339) and Frees Estate (201 Pac. 111).

The case of Roberts vs. Wehmeyer (36 C. A. D. 815) ruled that a deed by the husband alone is voidable and that this section has the same restraint upon transfers of community real property that Section 1242 C. C. has upon conveyances of homesteads, and further the purpose of the section is to place it beyond the power of either spouse, acting alone, to destroy the community character of such property by deed or incumbrance, the analogy between such a deed and that of homestead property being complete. The court held that the section did not affect the title to real property, but was a limitation upon the husband's power to dispose of the same.

Prior to the adoption of this section the husband had the right to give away an undivided half interest in the community without the consent of the wife. (Dargie vs. Patterson, 176 Cal. 714.) It was held that, prior to July 27th, 1917, such a gift is voidable solely at the wife's election as to an undivided half after death of husband without regard to consideration of his estate. (Dargie vs. Patterson, 65 Cal. Dec. 735, of Dec. 4, 1917.) The statute starts to run against the wife only on the death of the husband. (Spreckels case, 172 Cal. 775.)

COMPLIANCE WITH SEC. 172a, C. C.:

Deeds and mortgages, etc., affecting property standing of record in the name of the husband must be executed by both spouses. The wife must be a party to the instrument or contract, her signature alone is not sufficient to show her joinder.

Under the Roberts vs. Wehmeyer case personal execution is necessary. It is not safe to accept execution under a power of attorney in the absence of a decision of authority permitting it. In Goodrich vs. Tumey, 30 C. A. 683, the court said (obiter dicta) that contract of sale or exchange signed by husband only was not void but voidable at instance of the wife.

ASSIGNMENT BY HUSBAND ALONE:

Assignment of a certificate of sale acquired by a married man is not valid against the wife unless she signs also, his interest being identical with interest of a vendee under contract of sale. (31 Cal. 294.) Sheriff's deed later reciting the assignment does not cure the defect as he has no power to execute deed to an assignee except upon a valid assignment. (113 Cal. 552.)

DEDICATION BY HUSBAND ALONE:

To dedicate a street or create an easement against community property, the wife must join husband in the deed. (Cordano vs. Wright, 159 Cal. 610 to 620.)

"SEPARATE OR COMMUNITY," DEEDS CONSTRUED:

While Shaw vs. Bernal (163 Cal. 262) and Yoakum vs. Kingery (126 Cal. 32) decided that each took half as separate property, in Miller vs. Brode (62 Cal. Dec. 57) on June 30, 1921, the Supreme Court in bank decided that the husband's half is community property and the wife's half her separate estate and that the presumption under 164 C. C. governs.

There is no presumption as between husband and wife under 164 C. C. There is simply a prima facie presumption (except where a purchaser or encumbrancer in good faith and for a valuable consideration is concerned). (Shaw vs. Bernal, 163 Cal. 270.)

It was held in Hammond vs. McCullough (59 Cal. 639) that a deed from wife to husband is good upon delivery with intent to divest herself of title and immediately vest the husband with title. Such deeds will be given their legal force and effect.

COMMUNITY PROPERTY IN WIFE'S NAME:

Husband dies, wife is administratrix and includes her own property in final account as being community property of estate. Court has jurisdiction over the property, wife is estopped from claiming it and decree is final. (Estate of Simonton, 190 Pac. 442.)

DEED TO WIFE "AS HER SEPARATE PROPERTY":

Property was purchased with community funds and the deed ran to the wife "as her separate property". As this was done with husband's consent he is bound thereby and cannot obtain judgment decreeing it community property. (Miller vs. Brode, 62 Cal. Dec. 57, June 30, 1921.) As this decree was based upon evidence adduced it does not interfere with the rule of vesting under the presumption in 164 C. C.

CONTRACT INTEREST AS COMMUNITY PROPERTY:

The presumption of separate property arising from a deed to a married woman under 164 C. C. has no application to a contract of sale in favor of a married woman and assignment by her is void if payments were made from community funds. (See Peiser vs. Bradbury, 138 Cal. 570.)

PROPERTY IN BOTH NAMES, CONSIDERATION SEPARATE:

Real property purchased with the separate funds of husband and wife is presumed to be the separate property of each. (Yoakum vs. Kingery, 126 Cal. 30.)

DEEDS TO DEFEAT PROBATE:

Husband and wife sometimes make each a deed to the other, both of the same date and covering the same property. This is done so that the survivor may record one deed and destroy the other and so avoid administration proceedings in the probate court. Usually there has been no delivery of these deeds and no title actually passes, tho delivery is presumed by recordation as to innocent third parties. If put to the test, the facts as to delivery govern and not the intention of the parties.

Deeds between husband and wife to avoid administration on death of either are a fraud upon the law. (Hammond vs. Weir, 41 C. D. 439.)

The husband takes the community property - not as an heir (74 Cal. 526). The wife takes her community share as an heir (153 Cal. 359).

D I V O R C E

CAUSES:

Adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance for one year, conviction of felony (92 C. C.). There are 6 causes for annulment of marriage set out in Sec. 82, C. C.

SEPARATE MAINTENANCE:

The wife may sue for maintenance without divorce in certain cases and the court may grant relief in its discretion (137 C. C.). Its decree may be enforced and the husband's property bound thereby. (115 Cal. 266, 117 Cal. 633.)

COURT ACTION:

No divorce can be entered merely upon default of the defendant, the court must require proof of the allegations. (130 C. C.)

After entry of the interlocutory decree, neither party can dismiss the action without consent of the other. (131 C. C., 1915.)

The final decree can be made only after one year has elapsed from the interlocutory decree, but not if any appeal or motion for a new trial on the first decree is pending.

DEATH OF PARTY:

The death of either party after the entry of the interlocutory decree does not impair the power of the court to enter final judgment. (132 C. C.; Est. of Seiler, 164 Cal. 181; Est. of Dargie, 162 Cal. 51.)

PROPERTY IN DIVORCE:

If the decree be rendered on the ground of adultery or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court may deem just. (146 C. C.)

If on any grounds other than adultery or extreme cruelty the community property shall be equally divided between the parties. (146 C. C.)

The most useful case for title men to follow in dealing with property rights on divorce is that of Brown vs. Brown, decided April 7, 1915 - 147 Pac. 1168. (See 170 Cal. 1 and 8.) The Court held as follows:

1. When a final decree of divorce makes no disposition of the community property, the parties become tenants in common of such property.

2. "If the cause of divorce is neither extreme cruelty nor adultery, each will thereafter be the owner of an undivided one-half of the community property, WITHOUT FURTHER ORDER OF THE COURT, but, if given for either of said causes, the respective interests of the parties in the community property left undisposed of is subject to the determination of a court of competent jurisdiction in a subsequent action or proceeding."

3. If the complaint alleges that there is no community property, a decree of divorce reciting that all the allegations of the complaint are true, or words to that effect, constitutes an adjudication that at the time the action was begun there was no community property, and this is the effect of such a decree, notwithstanding the fact that the final decree is silent as to the property.

4. That property acquired by the husband after the action is instituted and at any time prior to the entry of the final decree for divorce is community property and, unless some adjudication pertaining to the same under a supplemental complaint has been made of said property, such property becomes on the entry of the final decree of divorce, the property of both plaintiff and defendant in the action, as tenants in common of such property, under the rule above set forth in Paragraph 2 hereof.

If real property is acquired by a married man, it is presumed to be community property and on divorce in another State, as foreign courts have no jurisdiction over California real property, the community property is divided, each spouse taking a half interest. If the wife acquired, the opposite would be true and she would take it all under the presumption in Sec. 164, C. C.

A property settlement fraudulently procured may be set aside in subsequent divorce proceedings. (McCahan vs. McCahan, 47 Cal. App. 176.)

HOMESTEAD ON DIVORCE:

If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period or sold as the Court may direct. (146 C. C.)

If a homestead has been selected from the separate property of either, it must be assigned to the former owner, altho the court may assign it for a limited period to the innocent party. (146 C. C.)

Decree awarding homestead community property to the wife terminates homestead rights of husband. (80 Cal. 237, 73 Cal. 425.)

Sec. 137, C. C., as amended, read with Sec. 147, compels the Court to determine homestead rights in a suit for separate maintenance without divorce. (165 Cal. 31.) If not so determined, decree may be amended. (23 Cal. App. 160.)

Homestead by married woman on her separate property is not affected by divorce decree in her favor where pleadings and decree are silent as to property. Property after divorce was held proof against execution. (111 Cal. 482.)

Property settlement and division between husband and wife, including transfer of interests inter se, abandons homestead. (121 Cal. 92.)

In awarding community property to wife, Court has power to vacate and discharge the prior recorded homestead. (165 Cal. 31.)

Homestead by husband on his separate property-deed to wife - divorce without adjudication of property rights. Husband is in same relation to property as if he had died. (78 Cal. 310.)

Court cannot dispose of community property or homestead until marriage is actually dissolved. (Remlay vs. Remlay, 33 C. A. D. 304.)

RECONCILIATION:

No final decree must be entered if parties effect a reconciliation even if one year since first decree has passed. (175 Cal. 250.)

Court may refuse to enter final decree after reconciliation. (165 Pac. 706.)

STRANGER TO TITLE:

Allegations in divorce between parties entirely foreign to the chain of title are not constructive notice. (153 Cal. 718.)

DECREE WHEN FINAL:

Interlocutory decree is final against appeal after sixty days. If entered upon personal service it is final against being unsettled on petition under Sec. 473, C. C. P., after six months; if entered on service by publication, then it is final in one year. (55 Cal. Dec. 827 of June 3, 1918, in Bancroft vs. Bancroft.) But final decree must be entered after one year to support the first decree.

Prior to the amendment of 1903 there was no provision for an interlocutory decree of divorce. (132 C. C.)

PROPERTY ON ANNULMENT:

Court has equitable jurisdiction of property if parties submit it as an issue. (94 Cal. 446 and 160 Cal. 671.)

RESUMPTION OF MAIDEN NAME:

Change of name is an incident to divorce just as is the right to remarry and is a similar incident to the decree, besides making a record upon which third parties may rely in dealing with the divorced woman.

Under common law any person has legal right to change his name and Sec. 1275 et seq., C. C. P., merely provides an additional method and makes the change a matter of record. (90 N. E. 947, 26 L. R. A. n. s. 1167.)

As there is no property in a name, and as persons may assume any name they please, it is probably a matter of choice which name a woman adopts on divorce. (9 R. C. L. 488, Note 65, Am. Dec. 355.)

A woman who acquired title prior to divorce under her married name, and who deeds out by the maiden name she has resumed, must use both names in the conveyance.

ALIMONY, NOT SUBJECT TO CONTRACT:

Alimony awarded to wife and made lien on property of husband by court cannot be abrogated by agreement between husband and wife. No case in California, but decided in Silberschmidt case (112 Ills. App. 58). In Wilson (45 Cal. 399) decided that statute conferred authority and parties could not abridge it. (See, also, 114 Cal. 542.) Court can affirm or disregard property settlements. (Loveren, 106 Cal. 509, and Sloan, 179 Cal. 393.)

WIFE SUED ALONE:

Married woman may sue and be sued without joining husband. (370 C. C. P., amended 7-29-21.)

(End of Subject)

JOINT TENANCY

JOINT INTEREST DEFINED:

A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. (683 C. C.)

THE FOUR UNITIES:

There are four requisites which must exist in the creation of a joint tenancy, that is, the tenants must have one and the same interest; the interest must accrue by one and the same conveyance; they must commence at one and the same time and the property must be held by one and the same undivided possession. If any one of these elements is lacking, the estate is not one in joint tenancy.

QUANTUM OF ESTATE:

The theory of a joint tenancy is that the fee title as a whole is vested in each of the tenants subject to the life interest of the other tenant or tenants and if one of the parties dies he merely drops out of the title, his interest ceases and the title remains vested in the survivors under the original deed creating the joint tenancy. No title is derived by the survivor from his deceased co-tenant, he takes solely from the original grant. (12 Cal. App. 355.)

DURATION:

The duration of a joint tenancy does not affect its validity; hence it may be created in fee, for life, for years, or even in remainder. (7 R. C. L. 811.)

WHAT PROPERTY MAY BE INCLUDED:

A joint tenancy may be created in either real or personal property. "Whatever may be subject to individual dominion by virtue of the law of sole ownership is likewise susceptible of being made subject to such joint dominion as results from the law of joint ownership." (Freeman on Co-tenancy.)

A joint tenancy in personal property created by oral agreement was upheld in Harris estate. (147 Cal. 967.)

CORPORATIONS BARRED:

A corporation cannot be a party to a joint tenancy as it would be repugnant to the theory of survivorship. (2 Cal. 297.)

NOT AN ESTATE OF INHERITANCE:

It is not correct to say that on the decease of one of the tenants the survivors inherit the share of the decedent, because in a joint tenancy there is no inheritance.

If a joint tenant should make a devise of the property and die, the claim of the surviving tenant arises at the same instant with that of the devisee and defeats the devise. (7 R. C. L. 812.)

FORM OF DEED:

The grant creating the tenancy must not name the proportionate shares conveyed to each tenant, such as "an undivided half each". Such a grant would create a tenancy in common.

No set words or phrases are called for in the codes by which a joint tenancy may be created; it is necessary, however, that the intention of the parties be clearly expressed. Title companies consider that the words "as joint tenants" following the names of the grantees in the granting clause of the deed, unsupported by any other explanatory language, are sufficient to express the intention of the parties in creating the joint tenancy. The habendum clause (if any) should run "to have and to hold to the said grantees as joint tenants". The right of survivorship being a necessary incident to a joint tenancy, without which such a tenancy cannot exist, it seems superfluous to add such words as "with the right of survivorship". (169 Cal. 287 and 30 C. A. D. 385.)

Our Supreme Court, in the case of Swan vs. Walden (156 Cal. 195), quotes with approval the wording of a joint tenancy deed which was approved by the Supreme Court of Indiana. The Indiana court said: "We know of no more apt term to create a joint tenancy than the expression 'convey and warrant to Daniel S. Wiggins and Laura Bell Wiggins in joint tenancy'."

Deed to husband and wife "as joint tenants with right of survivorship". Habendum "to said grantees and to the survivor of them forever". Creates good joint tenancy and not a life estate as joint tenants with remainder over to survivor. (Hilborn vs. Soule et al., November 4, 1919, 185 Pac. 982.)

It is doubtful if a joint tenancy can be created by a quitclaim deed. Affirmative words of establishment or creation should be used.

By agreement between husband and wife, husband and wife cannot create a joint tenancy in land which they hold as community property, or which is the separate property of either by executing a deed to themselves as joint tenants. (See 683 C. C.; 127 Cal. 143 at 149; 2 Cal. 289, 297.)

EFFECT OF DEED BY ONE TENANT:

If two persons hold as joint tenants and one deeds "an undivided half" or "all his interest", the joint tenancy is destroyed and the remaining tenant becomes a tenant in common with the new grantee, holding each an undivided half.

If three persons hold as joint tenants and one deeds his interest to a third party, the two remaining owners continue as joint tenants as to an undivided two-thirds as tenants in common with the stranger as to his undivided one-third.

If one tenant deeds in escrow, consider this example:

"A" and "B" own as joint tenants. "A" deeds to "C" an undivided half interest and delivers deed to "X" to hold until "A" dies, then deliver it to "C". Held that "B" took full title on death of "A". There was no assent or acceptance by "C" prior to death, at which moment "B" became fully vested. (Green vs. Skinner, 197 Pac. 60.)

From the nature of a joint tenancy it is apparent that any act of the parties, or of any of them, which affects a severance destroys the estate as such tenancy to that extent. This form of estate may be voluntarily severed, therefore, by a conveyance of any interest, or by partition, or, involuntarily, by a levy and sale under execution where the interests of any of them are subject to such levy, and as to such interest (7 R. C. L. 815) Tiedeman says "the joint tenancy is diminished to that extent".

PROOF OF DEATH:

When one joint tenant dies it becomes necessary to establish proof of death upon the public records. For the various ways of doing this see under "Estates".

ONE JOINT TENANT MAY MORTGAGE ALONE:

See Wilkins vs. Young in 55 Am. State Rep. 162 (144 Ind. 1), where it is held: Any interest a person may sell he may also mortgage. A joint tenant may mortgage his interest and right of survivor is suspended to that extent and right of redemption at death of tenant will fall to survivor as to such mortgaged interest. In Indiana, joint tenancy is allowed by statute between husband and wife, and if not created by words of limitation in the deed they take by the entireties. In this case grant was in good joint tenancy form, but habendum ran to "their heirs and assigns forever". The court found these words superfluous and in no way affect the intent of the grantor.

The same holds true of a trust deed. In either of such cases the mortgage or trust deed should be shown as an

exception or encumbrance, adding to the form of setting it up, "affecting an undivided half interest in said property and affecting only the interest of the mortgagor (or trustor) therein".

The effect of such an instrument is to suspend the joint tenancy so far as the mortgagee or trustee and beneficiary are concerned. Upon release or reconveyance the impairment ceases and the joint tenancy remains as before. Upon foreclosure and sale the purchaser would become a tenant in common with the other original joint tenant. The joint tenant not mortgaging, having an interest in the property, is entitled to redeem. (See Redemption under "Mortgages".)

CONVEYANCE OF PORTION OF PROPERTY:

Deed by one tenant of a specific part of the property held in joint tenancy is not void. (35 Cal. 576.) The grantee acquires all interest of his grantor in the tract deeded and holds as tenant in common with those who did not join in the conveyance. The rights of the remaining tenants are not prejudiced and the property not included in the deed remains as it was. A like result would occur upon partition.

CREATION BY SINGLE INSTRUMENT:

Under Section 683, C. C., above quoted, a joint interest must be "created by a single will or transfer". Where any doubt exists, as in a sale by an administrator or an agreement to convey to a married man alone followed by a deed to the man and his wife as joint tenants, the matter should be referred to the law department. Such a deed should recite that it is given and accepted in fulfillment of the sale or contract or an assignment recorded ante-dating the conveyance. There comes a time in such a transaction when the consideration is all paid and a deed is demandable. A husband may make a gift to his wife of half his equity and the minds of all parties meet to create a joint tenancy. The situation in an administrator's sale may be met by a deed to a third party from the husband and a subsequent deed to husband and wife as joint tenants.

JOINT TENANCY BETWEEN MARRIED MEN:

Held to be of doubtful validity by reason of wife's community expectancy. Vest under the deed, but protect your vesting with some such notation as this:

"The persons shown as vestees acquired title to said land by a deed sufficient in form to create a valid joint tenancy. The record does not disclose whether the purchase price was paid from the separate or community funds of the respective grantees. No guarantee is therefore made that the joint tenancy provisions of said deed would prevail over the statute governing the disposition of community property in the event of the death of either spouse."

The wife's community rights are so far recognized by the State of Washington that the wife's joint execution with the husband in his deed out has been held necessary to pass good title, and under two Washington decisions it is possible that property acquired by a married man with another person in joint tenancy may be held to be community property in California. (100 Pac. 858 and 75 Pac. 812.)

In any such case the wife's possible community rights cannot be ignored and must be carefully guarded against. No deed from a married man holding in joint tenancy should be accepted without the joinder of the wife if the property was acquired subsequent to July 27, 1917 (172a C. C.) or without her consent or the showing of a valuable consideration if acquired prior to said date.

JOINT TENANCY DEED TO MARRIED MAN AND ANOTHER PERSON:

The recorded deed contained a clause to the following effect signed and acknowledged by the wife of the married man:

"Mary Smith, wife of said John Smith, signs this deed for the purpose of establishing the fact that no community funds were used in the purchase of said property by her said husband and of disclaiming any right to or interest in said property that might be imputed by reason of the marital relationship of said parties."

The estoppel of the wife removed any doubt as to her claim of community rights if her husband should die before the other joint tenant.

JOINT PAYEES:

Where a mortgage or deed of trust runs to A and B, husband and wife, both should join in a release or request for reconveyance. Sec. 1431, C. C., and 1475 allows the presumption that rights in favor of several persons are joint and one person may extinguish the same on payment to him alone (96 Cal. 275), but a decision in 22 Cal. App. 921, appears to hold that where a mortgage runs to husband and wife the interest of the wife is presumed to be her separate property under 164 C. C. (Miller vs. Brode, 199 Pac. 531; Crowley vs. Bank, 159 Pac. 194.)

Joint deposits made payable to either or the survivors are governed by 1828 C. C.

Mortgages and notes running to A or B were formerly not held good. (See A. and Eng. Encyc. of Law, under Bills and Notes, p. 113.) The payee is uncertain, being a promise to pay A if the promisor does not pay B. It is, however, customary to accept a release by one where the check in payment is made payable to both. The negotiable instrument law of 1917 permits a note to be made to "one or some of several payees". (See 28 Cal. App. 1081 and 3089 C. C., Corpus Juris, 177, Sec. 303.)

JOINT TENANCY - LEASE BY ONE TENANT ONLY:

A and B own as joint tenants. B is insane. A executes an oil lease to C, an undivided half of land. If A dies, B is entitled to possession of the whole (177 Cal. 211). Lease severs the joint tenancy as to possession only, not as to title (172 Cal. 174). The oil lease gives the right to take away part of the real estate which belongs to both tenants (155 Cal. 140). B may recover judgment for half of oil produced; may enjoin C from molesting the land and lease is void in so far as it injures the interest of non-consenting tenant. (See W. Virginia cases, 52 S. E. 480, 19 S. E. 436, 27 S. E. 411.) If a lease was being worked before joint tenancy was created and was executed by one of several tenants in common, then there is no waste to be restrained (64 Cal. 134).

QUESTIONABLE LANGUAGE:

A deed is sometimes found running to "John Smith and Mary Smith, his wife, as joint tenants and to their heirs and assigns". Under 1070 C. C. it is provided that "If several parts of a deed are irreconcilable, the former part prevails." But in the well-established rule in Barnett vs. Barnett (104 Cal. 300) construing this section, it was decided that the intention of the parties must be ascertained from the entire instrument, the habendum as well as the premises being considered, and if it appear from the "habendum" that the grantor intended to restrict the estate, the habendum will prevail over the granting clause which controls and may even destroy the previous words of grant. Such deeds should be regarded with suspicion.

VESTING UNDER QUESTIONABLE DEED:

In case of any question as to the sufficiency of a deed to create a joint tenancy, do not vest "as joint tenants", but use the ordinary form for vesting, and add as a note:

"The deed from.....to.....and ....., dated ....., and recorded in book....., page..... of deeds, purports to create a joint tenancy. The language used in said deed is not deemed sufficiently explicit to determine the intention of the parties in that respect."

(End of Subject)

J U D G M E N T S

DEFINED:

A judgment is the final determination of the rights of the parties in an action or proceeding. (577 C. C., 167 Cal. 27, 159 Cal. 448.)

EXTENT OF JUDGMENT:

The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. (580 C. C.)

IN WHAT CASES ENTERED:

Judgment can legally be entered in one of the following proceedings (among others):

(a) By default in action or proceedings. (585, 871 C. C. P.)
(b) By confession of the parties.
By writing filed in open court by party or attorney in pending proceedings or action.
By verified written statement of party filed with clerk of Justice without action.
(1132 C. C. P.)
(c) By Court nunc pro tunc. (140 Cal. 178, 165 Cal. 591.)

WHEN ENTERED:

A judgment is entered when recorded in the Judgment Book. (668 C. C. P.)

WHEN DOCKETED:

A judgment is docketed when entered in the judgment docket. (672 C. C. P.)

EXTENT OF LIEN:

All money judgments rendered in the Superior Court or the Federal Courts become a lien from the time the judgment is docketed upon all the real property to the judgment debtor, not exempt from execution owned by him at the time, or which he may afterwards acquire until the lien ceases. The lien continues for five years unless it is stayed on appeal. (671 C. C. P., 97 Cal. 203.)

A judgment is not a lien upon property protected by a valid declaration of homestead. (See Homesteads.)

DEFEATED BY UNRECORDED DEED:

A deed by the judgment debtor dated and actually delivered prior to docketing the judgment, altho not recorded till thereafter, will defeat the judgment. The judgment creditor is not in the class of "purchasers" as defined by the code who take priority by recordation. (1214 C. C.) However, it is not safe to ignore such judgments. (100 Cal. 590.)

DEATH OF DEBTOR BEFORE JUDGMENT:

If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration of this estate. (669 C. C. P., 49 L. R. A., 1534 C. C. P., 103 Cal. 252.)

TRANSCRIPT OF JUDGMENT:

The transcript of the original docket of any judgment, the enforcement of which has not been stayed on appeal, certified by the clerk, may be filed with the recorder of any other county, and from such filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years unless judgment is previously satisfied or the lien otherwise discharged. (674 C. C. P.)

All transcripts and abstracts of judgments become a lien at the date they are recorded in the Recorder's office. The lien does not extend beyond five years from the date of the judgment. (674 and 900 C. C. P.) At the expiration of the two-year period above referred to a new transcript may be filed at any time before the expiration of the five-year period.

Under Sec. 674, C. C. P., as amended August 16, 1923, a transcript of judgment is good for five years. This affects both Superior Court and Federal Court judgments. The amendment is not considered to be retroactive so as to affect judgments docketed prior to said date.

CERTIFIED COPY NOT COMPLIANCE:

A certified copy of the judgment is not an "abstract" or transcript of same, and the filing thereof is not equivalent to filing an abstract. (52 Cal. 399.)

JUSTICE COURT JUDGMENTS:

A judgment rendered in a Justice's Court creates no lien upon any lands of the defendant, unless an abstract thereof is filed in the office of the recorder of the county in

which the lands are situated. From the time of the filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied.

Abstracts of judgments from the Justice's Court filed in the County Clerk's office are not liens. The purpose of such filing is to have an execution issued to another county within this State. (899 and 900 C. C. P.)

JUDGMENTS FOR COSTS:

Judgments for costs are nearly always docketed as open judgments, the amount being filled in by the clerk later, after the cost bill has been filed.

Judgment for costs is inseparably connected with main judgment and bond to stay execution is not necessary where main judgment is appealed from. (98 Cal. 442.)

JUDGMENT FOR ALIMONY:

For alimony or maintenance or attorney's fees for fixed sum per month for definite period is a lien on real property when docketed. (40 Cal. App. 1, 183 Pac. 862.)

Thus, judgment for alimony $7.00 per week for three years is not a lien. Judgment for $75.00 attorney's fees payable $10.00 a month is a lien.

ALL JUDGMENTS EQUAL LIENS, WHEN:

All attach as equal liens on property acquired later by debtor. Creditor who first gets execution obtains prior lien, but others are redemptioners on foreclosure. (179 Pac. 190, 57 Cal. Dec. 262.)

ASSIGNMENT NOT GOOD NOTICE:

Assignment of judgment is not constructive notice as code makes no such provision. (163 Cal. 8.)

JURISDICTION ON DEBTOR:

Where judgment recites service of summons it will be presumed that summons was actually served. (Bernhard vs. Wall, 59 Cal. 428.)

JUDGMENTS AGAINST ADMINISTRATORS, TRUSTEES, ETC.:

In an action prosecuted or defended by an administrator, executor or trustee costs may be recovered against him in his own right, but are chargeable against the estate or trust

unless the court directs otherwise. (1031 C. C. P.) Also see 1509 C. C. P.

When a judgment does not provide that costs be payable in due course of administration the executor is personally liable and execution may issue against him (103 Cal. 252). The same rule applies to trustees.

DEFICIENCY JUDGMENT, ATTACHES WHEN:

A deficiency judgment in a foreclosure action becomes a lien only after the sale of the premises and docketing of the deficiency judgment and continues for five years from the date of entry of the original foreclosure decree. (726 C. C. P., 30 Cal. 621, 119 Cal. 22.)

DEFICIENCY JUDGMENT, A LIEN ON LAND REDEEMED:

Deficiency judgment attaches to land redeemed by debtor even tho it was sold under same judgment. (92 Pac. 561, Montana decision.)

DEFICIENCY JUDGMENT, ONLY AFTER SALE:

Deficiency judgment cannot be obtained until security is exhausted and sale made. (140 Cal. 80.)

JUDGMENT, INTEREST AFFECTED:

The interest which the lien of a judgment affects is the actual interest which the debtor has in the property and a court of equity will always permit the real owner to show (there being no intervening fraud) that the apparent ownership of another is or was not real; and when the judgment debtor has no other interest except the naked legal title, the lien of the judgment does not attach. (Riverdale Mining Co. vs. Wicks, 14 Cal. App. 536.)

JUDGMENT AGAINST A LESSEE:

A leasehold estate for a definite period is personal property or chattel real under 765 C. C. (142 Cal. 529). A judgment is no lien, but if the lease runs for an indefinite term or as long as oil is produced by the lessee such lease is real property or a freehold interest and the judgment is a lien. (Bekins vs. Smith, 37 Cal. App. 222.)

But execution issued upon the leasehold interest creates a lien. (119 Cal. 192.)

A leasehold estate for a term of years is personal property at common law. The common law rule has not been changed in this State, and an estate for years is not subject to the lien of a judgment upon real property, and no lien

can be acquired thereupon under a judgment until levy of execution. (158 Cal. 738.)

JUDGMENT AGAINST MUNICIPALITY:

A judgment rendered by the court having jurisdiction of the subject matter and of the parties, declaring that property held by a city for public use is the property of a private individual, is, after it has become final, conclusive upon the city and the public. (Guaranty Trust & Savings Bank vs. City of Los Angeles, 61 Cal. Dec. 736.)

AGAINST VENDEE UNDER CONTRACT:

Is no lien where he has not paid up in full.

In the case of Belieu vs. Power (201 Pac. 620) it was decided that a judgment lien does not attach to an equitable interest in real property acquired by a vendee under a contract of purchase. The vendee having paid a portion of the purchase price and entered into possession is not the owner of said real property as referred to in 671 C. C.

AGAINST VENDOR:

Is a lien on land under contract of sale up to amount he still has in title unpaid for by vendee. Creditor may take proceedings to compel vendee to pay enough to clerk of court to satisfy his claim. (139 Pac. 514, 161 Pac. 838, 96 Pac. 1065; see 57 L. R. A. 643, 198 Pac. 432.)

A LIEN ON EQUITABLE INTEREST:

A judgment for money docketed against owner of equitable interest in land, such as vendee's interest under contract of sale or purchaser's interest under sheriff's certificate on execution, is a lien on equitable interest of judgment debtor. (20 Cal. 388, 58 Cal. 373, 15 R. C. L. 794, Sec. 249; 83 Cal. 521, 31 Cal. 294, 70 Cal. 296, 12 L. R. A. 741, a Minnesota case.)

AGAINST BANKRUPT:

The lien of the judgment acquired more than four months prior to the filing of the petition in bankruptcy is not affected by the discharge. (American Improvement Co. vs. Lilienthal, 29 Cal. App. Dec. 697. Also Oilfields Syndicate vs. American Improvement Co., 256 Fed. 979.) See under "Bankruptcy."

FEDERAL JUDGMENT:

Unless the State has passed a law providing for the docketing or recording of Federal judgments in the same manner

as State judgments are docketed or recorded, such judgments are a lien throughout the district. (44 Fed. 546, 235 Fed. 101.)

They are collected the same as State court judgments. (117 Fed. 699; Sec. 916, U. S. Rev. Stat.)

The amendment to Section 671, C. C., in effect August 18, 1923, provides that the transcript of a Federal court judgment preserves the lien for 5 years from the date of its docketing. This amendment, if effective, limits Federal judgments to counties where the judgment was rendered and to counties where a transcript has been filed. But, as there is no provision in law for the docketing of a Federal judgment, there is doubt as to the validity of this amendment, and it cannot be relied upon. Search should be made against Federal liens.

FINE AS LIEN:

A fine in a criminal proceeding is a lien as decided in Thompson vs. Avery, 11 Utah 214 (39 Pac. 829). See 1206 Penal Code, 113 Cal. 35, 171 Pac. 1097, and Federal fine is a lien, but after August 17, 1923, must be docketed under 671 or 674 C. C. P.

FEDERAL JUDGMENTS AND FINES:

A fine, docketed, is a lien against property of debtor. Imprisonment and discharge does not satisfy judgment. (The fine is the punishment, custody is method of executing it, 8 R. C. L. 283.) Such a judgment may be enforced by execution. Federal judgments need not be filed in county clerk's or recorder's offices. (See 275 Fed. 460, Federal judgment is lien throughout district.)

SMALL CLAIMS COURT:

In 1921 - Section 927 was added to the Code of Civil Procedure for the establishment of what is known as the "Small Claims Court". Said section provides that the jurisdiction of the court shall be confined to cases for the recovery of money only where the amount claimed does not exceed the sum of $50.00. Subdivision N of said section provides that an abstract of judgment rendered in said court may be filed in the office of the county clerk and said judgment docketed in the judgment docket of the Superior Court. Such docketing shall not be construed as creating a lien upon the lands of the judgment debtor, but shall be treated by the searcher in the same manner as the docketing in the Superior Court of the ordinary judgment rendered in the Justice's Court.

SATISFACTION OF JUDGMENTS

JUDGMENT MAY BE SATISFIED:

1. By endorsement of satisfaction on the margin of the record of the judgment book, either by the judgment creditor or by his attorney of record. (675 C. C. P.)
2. By release of satisfaction executed and acknowledged and filed among the papers in the case.
3. By the granting of a new trial.
4. By appeal and the filing of a bond to stay execution.
5. The searcher should ascertain whether objection has been made to the sureties on the appeal bond.
6. In a proper case by an order of court setting aside the judgment.
7. By return of an execution showing the judgment satisfied in full.

The searcher must not rely upon the clerk's notation on the docket to the effect that the judgment has been satisfied, but must ascertain that the judgment has been satisfied in one of the ways above set forth.

If the judgment has been partially satisfied, the searcher's report should show such fact.

PARTIAL DISCHARGE BY ATTORNEY NOT GOOD:

An attorney-at-law has no power, in the absence of express written authority, to release property from the lien of a judgment nor to release a judgment in full upon receipt of less than the full amount due thereunder. (283 C. C. P., 15 R. C. L. 299; Freeman on Jdgts., Sec. 464.)

MUST BE ACKNOWLEDGED:

A satisfaction of judgment must be acknowledged (675 C. C. P.) and may be recorded in the recorder's office; in fact the best practice is to so record all releases, other than full releases, showing certain specific property released from the lien of judgments with direction that after being recorded the releases shall be forwarded to the county clerk and by him filed.

NEW TRIAL VACATES JUDGMENT:

An order granting a new trial operates to vacate the judgments previously rendered. (28 Cal. 534.)

APPEAL AND STAY BOND:

An appeal properly taken and the filing of a stay bond "on the part of the appellant by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order" (exclusive of costs) operates to relieve the lien of a judgment from the property of the judgment debtor. (942 C. C. P.)

The stay bond above referred to should not be confused with the undertaking on appeal for ($300) provided for by Secs. 940 and 941, C. C. P.

FOR COSTS ONLY:

If the judgment is for costs only the undertaking on appeal (for $300) is sufficient and no stay bond is necessary. (98 Cal. 442.)

JUDGMENT SET ASIDE:

An order of court setting aside a judgment, as a matter of course, terminates its effect.

OBJECTION TO SURETIES:

The adverse party has 30 days in which to except to the sufficiency of the sureties after having received "notice of the filing of such undertaking, and unless they or other sureties, within 30 days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and $300 in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent." (948 C. C. P.)

In all cases where a stay bond has been filed upon appeal to the Supreme or Appellate Court, examination must be made to see if the court has ordered a new bond under the provisions of Sec. 954, C. C. P., for if such new bond be not given in accordance with the order, the judgment is no longer stayed and execution may issue thereupon. (136 Cal. 619.)

Both sureties must each be worth twice the amount of judgment. In Mohn vs. Superior Court, 35 Cal. Dec. 600, on 7-7-21, execution was upheld because of insufficiency of bond.

DISCHARGE CAN BE COMPELLED:

Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party of attorney must give such acknowledgment or make such endorsement, and upon motion, the court may compel it, or may order the entry of satisfaction to be made without it. (675 C. C. P.)

SURETY COMPANY ALONE SUFFICIENT:

A surety company may become the sole and sufficient surety on the stay of execution on appeal. (Sec. 1056, C. C. P.)

APPELLANT NEED NOT SIGN BOND:

It is not necessary for the stay bond to be executed by the appellant, it must be executed in his behalf by the sureties and their bond is sufficient. (Crutes vs. Richards, 9 Cal. 34-39.)

QUITCLAIM AS RELEASE:

Release of separate parcels of land from a judgment by quitclaim deed reciting its purpose may not be good (119 Cal. 283), but should be endorsed on margin of docket.

RELEASE OF ONE OF SEVERAL DEBTORS:

Release of one debtor from a judgment does not release the other debtors (See 1543 C. C.) unless it is a joint judgment where all are jointly liable. (113 Cal. 414, 127 Cal. 370.)

SEARCHING FOR JUDGMENTS:

It is necessary to search for judgments against each successive owner of the fee title, or any part thereof from the date five years prior to the date of your search to the date of recording of the deed by which the person against whom you are searching parted with his title or interest in the premises. The notes should show judgments against holders of tax titles and of agreements to convey.

In making an examination of judgment, the searcher should in every case ascertain whether any assignment or assignments appear among the files in the action.

A judgment may be satisfied by either the judgment creditor or his attorney of record, but a satisfaction as to a portion of the judgment debtors or property can be lawfully executed only by the judgment creditor himself; the attorney of record has no authority to apportion the judgment by satisfying the same as to some of the debtors or as to a portion of the property. A satisfaction in full by the attorney of record should either acknowledge receipt of the full amount of the

judgment or recite that the judgment has been fully paid.

Where property is vested in a married woman presumptively as her separate property or as her separate property, other than by deed of gift to her from her husband, do not examine or show judgments against the husband. Where property is vested in the wife by deed of gift to her from her husband, examine judgments against the husband and if the claim upon which said judgments are founded antedates the deed from the husband, note such judgments in writeup.

Where title is vested in a woman presumptively as community property, note unsatisfied judgments against the husband.

Do not depend on the files in the case for satisfaction or release of judgments, examine the register of actions also. The appeal and stay bond will not be found among the papers, ask the clerk for them when wanted if they are noted upon the Register of Actions.

DOCKETING UNDER INCORRECT NAME:

In order to create a judgment lien, the judgment alone is insufficient - it must be properly docketed; and among other essentials to a proper docketing of the judgment is that it be docketed against the judgment debtor in his correct name.

A subsequent innocent purchaser from a judgment debtor of property acquired and conveyed under a distinct name does not take title subject to the lien of a judgment docketed against the judgment debtor in another name. (Huff vs. Sweetser, 8 Cal. App. 689.)

But where judgments appear against persons having names similar to those in the search, always set them out. (See 50 Cal. 517, where the given name of the judgment debtor was entirely omitted and the judgment lien was held good.)

A T T A C H M E N T S

ATTACHMENT DEFINED:

An attachment is a seizure of defendant's property as security for any judgment plaintiff may recover in the action. The attachment is merely a proceeding ancillary to the action, by which the party is enabled to acquire a lien for the security of his demand by a levy made before instead of after the entry of a judgment. (11 Cal. App. 27.) The law allowing an attachment is strictly construed and must be strictly followed. (537 C. C. P., 11 Cal. App. 27, 148 Cal. 293, 3 Enc. Pl. & Pr. 3, Stand. Proc. 238, 4 Cyc. 395, 6 C. J. 28.)

HOW LEVIED:

For method of levy of the attachment see Sec. 541, C. C. P.

ON PROPERTY IN ANOTHER'S NAME:

Sec. 542, C. C. P., provides that "Real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person must be attached, by filing with the recorder of the county, a copy of a writ, together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him) are attached."

An attachment on the interest of A of record in the name of B fixes a lien on said interest if any exists (101 Cal. 224). Recording of writ gives notice to third parties. If gone to judgment, lien remains unless stay bond is filed. If B had conveyed out by prior dated but later recorded deed, it becomes a question of fact as to delivery of the deed whether the attachment holds good. (See 34 Cal. App. 184 to contrary nullified by 164 Cal. 537.)

ATTACHMENT PRESERVES PRIORITY OF LIEN:

A purchaser at a subsequent execution sale after the suit has resulted in a judgment acquires all interest of the judgment debtor from and after the levy of the attachment, and although the lien of the attachment is merged in that of the judgment (37 Cal. 121, 72 Cal. 65), it in effect relates the judgment back to the levy of the writ, and remains in force sufficient to preserve the priority of the judgment lien as against liens attaching subsequent to the filing of the attachment and prior to the docketing of any judgment rendered in the attachment suit.

PERIOD OF ATTACHMENT LIEN:

The attachment lien continues for three years after the date of levy unless sooner released or discharged, or unless the action be sooner dismissed or goes to judgment. On motion made not less than five or more than sixty days before the expiration of said three-year period, the court may extend the period not to exceed two years from such expiration date. (542a C. C. P.)

HOMESTEAD DEFEATS ATTACHMENT:

A declaration of homestead recorded after the attachment and before judgment is rendered and docketed will defeat the lien of the judgment as to the property covered by the declaration, provided the homestead is good in fact and the declaration conforms to the statute. (54 Cal. 81.)

DEED OF LAND SUBJECT TO ATTACHMENT:

When the owner of property covered by a recorded attachment conveys the same, the attachment suit should be examined and the name of the late owner run for any judgment that may be rendered after he has parted with the title. Though the judgment itself may not be a direct lien, the attachment remains. (121 Cal. 647.) Nor is the attachment merged into the judgment and the lien of the attachment is not released by an undertaking upon appeal to stay execution upon the judgment. (97 Cal. 203.)

ATTACHMENT, HOW RELEASED:

"An attachment as to any real property may be released by writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged in the like manner as a grant of real property. Such attachment may also be released by an entry in the margin of the record thereof, in the county recorder's office." (560 C. C. P.)

It may be discharged by an order of court if it was improperly or irregularly issued. (556-558 C. C. P.)

The court may discharge the attachment on motion of defendant upon notice to plaintiff. (6 Cal. App. 274.)

The attachment can be released by the officer upon being shown that the property is exempt from levy. As to what property is exempt from attachment or execution see Sec. 690, C. C. P.

Dismissal of the action discharges an attachment.

The code nowhere specifically provides for a deposit of money for the release of an attachment.

EXECUTIONS

DEFINED:

An execution is a writ issued out of a trial court to a sheriff, constable, or commissioner, appointed by the court, to enforce a judgment against the person or property of a judgment debtor. (681 C. C. P., 131 Cal. 527.)

TO WHOM ISSUED:

Executions issue out of trial courts to a sheriff, constable or commissioner appointed. (94 Cal. 220, 131 Cal. 527.)

WHO MAY DEMAND EXECUTION AND WHEN:

The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. If, after the entry of the judgment, the issuing of execution thereon is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the five years within which execution may issue. (681 C. C. P.)

An execution may be issued after the lapse of five years upon leave of court. (685 C. C. P.)

WHEN AND HOW RETURNABLE:

The execution may be made returnable at any time not less than 10 nor more than 60 days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto in a book called the execution book. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated. (683 C. C. P., 94 Cal. 217.)

Judgment creditor must sell within period of his lien and execution does not extend lien or create new lien. (46 Cal. 654, 37 Cal. 122.)

HOW DISCHARGED:

An execution may be recalled, quashed or set aside as follows:

(a) When stayed after issue by giving bond or by order of court. (166 Cal. 325, 563.)

(b) When judgment is void or has been satisfied or discharged. (98 Cal. 355, 71 Cal. 183, 73 Cal. 5, 81 Cal. 202.)

(c) When writ has not been properly issued. (92 Cal. 393, 93 Cal. 120.)

(d) By separate action to enjoin enforcement. (130 Cal. 275.)

EXECUTION AFTER DEATH OF PARTY:

Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon. (686 C. C. P., 123 Cal. 657, 69 Cal. 517, 42 Cal. 129, 29 Cal. 359.)

WHEN NO DEED FOUND RECORDED:

Successor in office to sheriff who sold is authorized to issue deed. (See County government acts.)

(End of Subject)

MAPS

The Act requiring recording of maps, approved March 9, 1893, amended 1901, was repealed June 11, 1913.

The Act approved March 15, 1907 (Stat. 1907, p. 290, amended see post), provides:

When land is subdivided for selling by reference to plat the owners must file with the county recorder an accurate map thereof complying with certain requirements, among which are the following:

> Parcels dedicated for public use must show dimensions, boundaries and courses of boundary lines. All lots not dedicated must be designated by number or letter with dimensions, etc.
>
> All parcels offered for dedication and not accepted must be designated by number or letter. The exact location of the subdivision with reference to adjacent subdivisions or U. S. survey corners must be shown.
>
> Map must be on cloth, 18" x 26", or 13" x 18". If more than one sheet is used, sheets must be numbered and show connections.
>
> The map must be signed by all owners "and also by all other persons whose consent is necessary to pass a clear title to the land" and all signers must acknowledge.
>
> All parcels for public use must be dedicated. The map, if any part is dedicated, must be presented to the supervisors, trustees, city council, or others who control public highways, who shall endorse which highways are accepted. Every map must have a title which must not conflict with names of other subdivisions. The county recorder must examine name or title and compare it with the records and may refuse to file the plat in case of conflict with previous name. No person may offer for sale or sell any lot by plat not in strict accordance herewith under penalty of fine and imprisonment.

It is expressly provided that the recordation of any map not executed and approved as required by the act shall be NULL and VOID.

The amendment in effect July 22, 1919 (Stat. 1919, p. 725),

requires map to be submitted to city or county planning commission or governing body for approval, which must be endorsed thereon and map cannot be filed without it. Highways dedicated may be made to conform to surrounding streets.

If the land lies in unincorporated territory and within 3 miles of any city or town, the board of supervisors must submit the plat to the planning commission, or engineer of the city nearest to it.

The amendment in effect July 22, 1919 (Stat. 1919, p. 164), modifies the requirements for a tax bond, none being necessary with a map recorded after the date on which current taxes become payable and before the date of the next year's assessment.

Another amendment in effect July 22, 1919 (Stat. 1919, p. 176), provides that when a map is filed to show as acreage land previously subdivided, no survey or certificate by surveyor or engineer shall be required.

An Act in effect July 22, 1919 (Stat. 1919,p. 329), provides for the exclusion of parts of and vacation or alteration of maps.

Two-thirds of the owners in area of any recorded plat may apply to the Superior Court and cause part of any map to be excluded and the map altered or vacated upon terms and procedure specified. Public highways are not affected.

On filing copy of decree county recorder shall make notation on the map and a new plat must be filed.

Act in effect July 29, 1921 (Stat. 1921, p. 548), provides that all or part of land subdivided may be excluded from map by Superior Court on petition of two-thirds of owners. Public streets are not affected. Repeals similar act in Stat. 1919, p. 329.

Map recording act of March 15, 1907, as amended in 1921 (Stat. 1921, p. 1002), provides that governing body may require before filing an easement for storm drain along any natural water course.

The Act approved June 1, 1917 (Stat. 1917, p. 1653), cured defects in plats filed up to January 1, 1917. Sales by reference to same and recorded conveyances of land by said map are validated.

The curative act was brought down to January 1, 1921 (Stat. 1921, p. 827).

THE AMENDMENTS OF 1923:

The amendment in effect August 17, 1923 (Stat. 1923,

p. 378), provides for dedication of a right of way for storm drain in these words:

> "In the event that the tract of land shown upon the map or plat is traversed by any natural water course or channel, such governing body may require as a condition precedent to the approval of such map or plat, either the dedication to public use of an easement or a conveyance to the political subdivision of a right of way for storm drain purposes to conform substantially with the lines of such natural water course or channel."

NOTE: Care should be taken to see if such an easement has been dedicated. It is usually shown by dotted lines on the map and also in the formal dedication. Where it occurs the easement must be excepted in any certificate or policy covering the land affected.

MAPS TO BE MADE IN DUPLICATE:

The Amendments of 1923, p. 378 (Aug. 17, 1923), require maps be made and filed in duplicate.

CONTRACTS IN VIOLATION OF MAP ACT VOID:

The California Supreme Court has held (Smith vs. Bach, 183 Cal. 259) a contract violating the terms of the act is void. A statute prohibiting the making of contract except in a certain manner, ipso facto makes them void if made in any other way. See, also, Barnes vs. Shank, 12 Cal. App. 391, where sales were held good if, in addition to reference to a map wrongly recorded, a mete and bound description was used. (Corpus Juris, Vol. 18, p. 184, Sec. 67, treats the matter liberally and cites cases from sister States.) Doubtful cases should be referred to counsel.

A contract for the sale of land by reference to an unrecorded map in violation of the provisions of the Act of March 15, 1907 (Statutes 1907, p. 290), as amended in 1913 (Statutes 1913, p. 570), is void. (Young vs. Laguna Land and Water Co., Cal. App. Dec. 388.)

DEDICATION, EFFECT OF:

Dedication consists of two parts to be complete, an offer and the acceptance thereof.

Where a dedication is complete, the owner loses control over its use and the dedication cannot be later qualified by any act on his part. (Archer vs. Salinas City, 93 Cal. 43.)

The adoption by the city of a later map omitting the showing or designation of a former street cannot operate as an abandonment thereof. (Eureka vs. Gates, 137 Cal. 89.)

Where the owner filed a map showing streets for public use no formal acceptance by the authorities is necessary and until such acceptance the owner holds title, dedicated in trust for the public. (Daly City vs. Hollbrook, 28 Cal. App. Dec. 66.)

A deed by map reference gives grantee private easement over all streets and ways shown on map apart from public dedication.

When streets are marked on ground in absence of map, appurtenant right to use streets rests on equitable estoppel. (Danielson vs. Sykes, 157 Cal. 686.)

The dedicator retains the fee and the public acquires an easement. (31 Cal. 585.)

As to what are considered proper highway uses in California see Gurnsey vs. N. Cal. Power Co. (160 Cal. 699).

DEDICATION BY HUSBAND ALONE INSUFFICIENT:

To dedicate a street or create an easement against community property, the wife must join in the deed. (Cordano vs. Wright, 159 Cal. 610 to 620.)

MORTGAGE OMITTED FROM MAP:

The security of a mortgage given prior to dedication cannot be impaired by the mortgagor's plat, and purchaser at foreclosure sale would acquire title free of the dedication, but a deed to the mortgagee in satisfaction of the debt after filing map would be subject to mortgagor's dedication. (93 Cal. 43.)

ENDORSEMENT OF MAP BY TRUSTEE:

The usual form deed of trust gives the trustee no power to dedicate any of the property to public use.

A trustee cannot make a valid dedication without consent of the beneficiary. (160 Fed. 794, 22 L. R. A. 1026.) If the beneficiary has knowledge of such dedication and makes no objection, lapse of time would estop him as against the public easement.

ATTEMPTED DEDICATION BY ADMINISTRATOR:

Administrator of estate has not power to dedicate to public use any real property of the estate and probate court

has not power to authorize same. (74 Cal. 526, 79 Cal. 388, 59 Cal. 206; also 137 Iowa, 114 N. W. 896, 141 Cal. 366.)

DEDICATION OF PARK OR PLAZA:

The extent of the easement is determined by the "scope of the dedication." The officials attempted to erect a town hall in the plaza of the town of Hayward dedicated in 1854 by the word "Plaza" upon the filed plat. This was held to be without the scope of the dedication in Kelly vs. Town of Hayward (219 Pac. 440).

The proper uses of land dedicated as a public park were carefully defined in the leading case of Spires vs. Cy. of Los Angeles (150 Cal. 64). The distinction was drawn between business and recreational purposes; the park being seven miles from center of the city, its purposes would be essentially recreational.

The attempted taking of land dedicated as a park for street purposes was forbidden in Hall vs. Fairchild G. W. Co. (May, 1924), Dist. Ct. of Appeals. This decision sustained the rule that when land is once dedicated for park purposes it is beyond the authority of the city, or even the Legislature, to withdraw it therefrom.

VACATION

VACATION AFFECTS EASEMENT ONLY, CANNOT BE CONDITIONAL:

The board of supervisors has power to vacate the public easement, but has no power to reserve sand in the vacated street. Its only power under the statute is to maintain a highway, the owner retaining all rights in the soil not inconsistent therewith. (Guernsey vs. N. Cal. Power Co., 160 Cal. 699.)

VACATION OF PARK OR PLAZA:

The case of People vs. Holloway (93 Cal. 241) establishes the principle that a decree obtained against city or county may be pleaded as a bar against any attempt to enforce the easement.

PUBLIC PARKS:

May be abandoned by municipal corporations with consent of original dedicators and lands sold. (Stat. 1915, p. 1251, and 1919, p. 237.)

IRREGULAR VACATION PROCEEDINGS UPHELD:

Held good in spite of irregularity or want of notice. (16 Cal. App. 72, 148 Cal. 635.)

(End of Subject)

MECHANICS' LIENS

The present Mechanics' and Materialmen's Lien Law was passed in 1911 (see amendments in effect July 19, 1919) and is set out in the Code of Civil Procedure, Secs. 1183 to 1202.

LIEN DEFINED:

A lien is a charge imposed upon specific property by which it is made security for the performance of an act. (1180 C. C. P.)

WHO MAY CLAIM LIEN:

(a) Every original contractor within 60 days after the completion of his contract.

(b) Every person save the original contractor, within 30 days after he has ceased to labor or to furnish materials, or both; or, at his option, within 30 days after the completion of the original contract, if any, under which he was employed, or the completion of the structure.

WHO IS AN ORIGINAL CONTRACTOR:

A painter who contracts with the owner to paint a building and furnish materials is an original contractor. (92 Cal. 235.)

When owner constructs building under distinct contracts for different departments of work, each person contracted with is an original contractor and has 60 days to file lien claims after completion. (106 Cal. 233.)

STATUTORY REQUIREMENTS OF CLAIM:

The claim of lien must be filed in the recorder's office and must contain

(a) A statement of the demand, after deducting all just credits and offsets.

(b) The name of the owner or reputed owner, if known.

(c) The name of the person by whom he is employed or to whom the materials were furnished.

(d) A statement of the price, if any, agreed upon for the same and when payable, and of the work to be done and when the same was done, if agreed upon.

(e) A description of the property to be charged with the lien, sufficient for identification.

(f) Claim must be verified by the oath of claimant or of some other person. (1187 C. C. P.)

PROPERTY SUBJECT TO LIEN:

The land upon which any building or improvement is constructed, or so much as may be required for the convenient use and occupation thereof, is subject to the lien if owned by the person causing the improvement to be made at commencement of work or of furnishing materials, but only to the extent of his interest, except as provided by Sec. 1192, C. C. P., under which section work will be presumed to have been done at the instance of the owner unless he file notice of non-responsibility.

There is no limitation as to the interest subject to the lien whether it is legal or equitable. (178 Cal. 674.)

FARM LAND EXEMPT:

Young vs. Shriver, Feb. 28, 1922 (C. A. D. 37, p. 510), decided that mechanics' liens do not apply to agricultural lands.

AMOUNT OF LIEN:

The amount which can be recovered is not limited by the amount which the owner owes the contractor. The owner, however, may limit the amount payable by demanding a bond from the contractor and filing same, which bond shall be a guaranty for the payment of the labor and materials. If the owner files the original contract with the contractor's bond in an amount not less than 50 per cent of the contract price, the effect is to limit the amount of liens recoverable to the amount found due from the owner to the contractor. Any sum found due beyond this will result in a deficiency judgment for the difference against the contractor and his sureties upon the bond. (1183 C. C. P.)

NOTICE OF WORK DONE:

Material and labormen may notify the owner of materials and labor furnished or contracted for (1184 C. C. P.) and the owner may demand in writing a similar notice from them at any time before or after the work is commenced. The owner is not compelled to withhold any money from the contractor, but if he pays the original contractor after the above notice, he does so at his peril.

NOTICE OF COMPLETION:

After completion of any contract or improvement or within 10 days after cessation of labor for a period of 30

days, the owner has 10 days in which to file in the county recorder's office a notice of completion or cessation of labor. If not so filed all persons have 90 days after actual completion of the improvement to file their claims of lien. (1187 C. C. P.) Under this section as it formerly stood the filing of a notice of completion was necessary only when a contract existed. Where there was no original contract such liens must be filed within thirty days after ceasing to labor or to furnish materials. (1187 C. C. P., construed in Irwin vs. Silva, 40 Cal. App. 135.) This section was amended, effective July 22, 1919, to allow the owner to file his notice upon completion of the contract or upon cessation of labor or to file it upon completion of the improvements.

The notice of completion must state the date when the work was completed or on which cessation of labor occurred, together with his name and the nature of his title and a description of the property sufficient for identification. The notice must be verified by the owner or some person on his behalf. The recording fee is $1.00.

If the notice is not filed all persons have 90 days after completion of the improvement to file their claims of lien.

The time allowed within which to file the claim of lien begins to run from the date of the filing of the notice of completion and not from the date of actual completion. (Nelson vs. Hoge, 35 Cal. App. Dec. 735.)

The word "owner" includes all persons having any assignable interest (27 Cyc. 52). If "A" and "B" own as tenants in common and "B" orders the improvements made, "A's" interest may be subjected to the lien if he had knowledge of the improvements and did not give notice of non-responsibility. If "A" had no knowledge his interest would not be subjected to the lien. (173 Cal. 667 and 23 Cal. App. 687.) If the wife owns as separate property the husband cannot subject the property to the lien by ordering improvements without his wife's consent if she had no knowledge of the same. (41 Cal. App. 449.) If "A" owns and "B" is in possession under a contract of sale and "B" orders the improvements, "A's" interest cannot be subjected to the lien if he has no knowledge of the improvements. (37 Cal. 61 and 81 Cal. 619.)

You will find these notices of completion sometimes signed by the contractor or omitting the date of completion or some essential statement required by the code. Such defects should be carefully noted as they may destroy the effect of the notice and it may be insufficient to shut out lien claims until 90 days have run. They are often useful, however, in setting out the actual date of completion so that the 90-day limit may be determined.

COMPLETION DEFINED:

Occupation or use of the improvement or structure by the owner or his representative.

Acceptance by the owner or his agent.
Cessation of labor for 30 days.

Occupation by the owner accompanied by cessation of labor is equivalent to completion. This applies to a lessee or a vendee under contract of sale where they have ordered the improvements.

ACTION TO ENFORCE LIEN:

Any action must be commenced within 90 days after filing the lien, otherwise the claim as against the property is released, or, if credit for an extended period has been given, then within 90 days after expiration of such period, but not longer than one year after work completed. The action must be brought to trial within two years after commencement, otherwise the case may be dismissed.

NOTICE OF NON-RESPONSIBILITY:

An owner may file such a notice under Sec. 1192, C. C., within 10 days after acquiring knowledge of improvements being made by posting a notice on the property and by filing a verified copy of the notice in the county recorder's office. This is usually done where the improvements are undertaken by a lessee or a person in possession under a contract of purchase.

A recent case, 43 Cal. App. 718, related to a notice of non-responsibility which was not verified but was acknowledged and recorded and a copy served personally upon the lien claimant and posted upon the property. The court held the notice was insufficient and of no effect. Whether the notice is in substantial accord with Section 1187 "is a question of construction and judicial judgment in each and every doubtful case".

If a notice of completion is filed by one of several owners the interest of other owners cannot be subjected to the lien unless it can be shown that they had knowledge of the improvement and had failed to file notice of non-responsibility, but if the notice of non-responsibility has not been filed by an owner having knowledge of the improvement, said improvements are presumed to have been done "at the instance of such owner". (80 Cal. 275 and 158 Cal. 328.)

PRIORITY OF LIEN:

Mechanics' liens take preference over any mortgage, lien or encumbrance which may have attached subsequent to the time when the work was commenced or materials were commenced to be furnished, or an encumbrance in existence but of which

the claimant had no notice or which was not recorded when such work was commenced. The claim of lien and the suit to enforce it will show the date of starting work or of furnishing materials, but not often the actual commencement of the improvement on the ground.

Where there is no valid contract between owner and contractor, priority of lien between mechanic and mortgagee is to be determined "by the time the work was done or the materials commenced to be furnished". (131 Cal. 144 and 154 Cal. 249.)

Mechanics' liens as between themselves take priority and require satisfaction as follows:

1. Liens of persons performing manual labor.
2. Liens of persons furnishing materials.
3. Liens of sub-contractors.
4. Liens of original contractors.

FORM FOR POLICY:

The following is a good form to use to protect a certificate or policy (to be adapted to the circumstances):

> "Any liability by reason of claims of the contractor, mechanics or materialmen or those claiming thereunder that may be filed against said property in connection with improvements being constructed thereon (or within 60 days from.....the date of filing notice of completion on said improvements)."

SUMMARY FOR SEARCHER:

If notice of completion is regular, then liens of material and labor claimants are barred 30 days after recordation of the notice and the original contractor is barred after 60 days. If there is a contract in evidence, the contractor may give a receipt for all money due thereunder and a waiver of all claims against the property and thus cut down the lien period to 30 days. If no notice of completion is filed, or if the recorded notice is not in compliance with the code requirements, lien claims may be filed against the property within 90 days from actual completion.

If a mortgage or deed of trust is of record before any work is actually done or materials on the ground it ranks ahead of subsequent lien claimants, but not otherwise. This involves a question of fact not disclosed by the records. The priority of the liens is determined (131 Cal. 132, 144) by the date of recording the mortgage and the date of commencing the building where there is a valid contract, or by the date the

work was done or materials commenced to be furnished where there is no valid contract. This rule has been followed since in many cases.

Merely recording the mortgage in a building loan transaction is not enough when the money is to be advanced as the work progresses. It must be a consummated loan and the money should be placed to the credit of the borrower in full and then held under an agreement to disburse it in installments. The test is that the whole loan must be obligatory and not optional or discretionary. Otherwise a lien might intervene between the amount actually advanced and the amount not put up by the lender.

(End of Subject)

MORTGAGES

DEFINED:

A mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity for a change of possession. (2920 C. C.)

Any interest in real property that can be conveyed by deed may be mortgaged.

A mortgage is a lien on, not an interest in, real property. The note is the principal feature and the mortgage is incidental to it, so that ownership of the note carries the mortgage with it. (2936 C. C., 88 Cal. 319.)

The note is the obligation creating the relationship of debtor and creditor, and it must be given for a good consideration. Such a note usually states on its face that it is secured by a mortgage (or a deed of trust), which makes it non-negotiable. By statutory amendment, notwithstanding any conditions in the instrument securing same (Stat. 1921, p. 471), such notes are now negotiable and pass from hand to hand immune from any defenses (such as want of consideration, fraud, offsets, counter-claims) that the original maker might set up.

A mortgage need not describe the debt it secures. (47 Pac. 751.)

The assignee of a negotiable note past due takes subject to equities in favor of parties but not to latent equities of third party. (35 Cal. 91.)

The assignee of a negotiable note without endorsement takes subject to equities. (126 Cal. 107.)

MORTGAGE IN FORM OF DEED:

Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. (2924 C. C.)

A deed absolute on its face, but given as security for a debt or the performance of a condition, is treated in equity as a mortgage as between the parties to it and may be foreclosed as such, but this would not affect the rights of an innocent purchaser from the grantee meanwhile.

When it is sought to declare a deed a mortgage, the mortgagor cannot demand foreclosure. His is an action to redeem. If he redeems, the mortgageis satisfied. If not, his

action should be dismissed. (112 Cal. 581, 110 Cal. 107.)

AFTER-ACQUIRED PROPERTY:

The mortgagor need not own the property he describes in his mortgage. Title he acquires subsequently inures to the mortgagee as security for the debt. The mortgage may cover after-acquired property by its own terms (27 Cyc. 1040), but in such a case a purchase money mortgage given back to the grantor of such after-acquired property would be a superior lien to the recorded mortgage. (85 Cal. 280.)

POWER OF SALE:

A power of sale may be given to the mortgagee, or to any other person, by the terms of the mortgage, to sell on default.

CHATTEL MORTGAGES:

A mortgage differs from a pledge in that the latter is accompanied by change of possession. (2924 C. C.)

A chattel mortgage may cover all kinds of personal property except (2955 C. C.)—

(a) Personal property not capable of manual delivery.

(b) Wearing apparel and articles of personal adornment.

(c) The stock in trade of a merchant.

A chattel mortgage to be effective must carry an affidavit by all parties to it that it is made in good faith and without design to defraud creditors, otherwise it is void as to third persons, and it must be acknowledged and recorded. (2957 C. C.) It must be recorded where the mortgagor resides, where the property is situated and in any county to which it is removed (a traveling band of sheep, for instance). It continues on a crop after severance as long as it remains on the land of the mortgagor (as hay cut and baled). (112 Cal. 180.)

Shares of stock are not capable of manual delivery and are not subject to be mortgaged under 2955 C. C.

The certificate of good faith when made by a corporation may read:

STATE OF CALIFORNIA
COUNTY OF.....

J. Smith and W. Brown, being duly sworn, each for himself deposes and says that J. Smith is

president of Smith Co., a California corporation, the mortgagor in the foregoing mortgage, and that W. Brown is the secretary of said corporation; that the foregoing mortgage is made in good faith and without design to hinder, delay or defraud creditors.

J. Smith
W. Brown

Subscribed and sworn to before me this day of 1920.

(Notary signs and attaches seal)

The affidavit of good faith may be made by the agent of a foreign corporation. (S. F. Breweries Co. vs. Schurtz, 104 Cal. 420.)

PURCHASE MONEY MORTGAGES:

Should be recorded at the same time as the deed under which the mortgagor acquires title, to preserve priority. It may be given to the vendor or to a third person who advances the money for the purchase (27 Cyc. 1060), but in the latter case the mortgage should recite the facts to protect the mortgagee (2898 C. C., 120 Cal. 280). It must be one transaction (85 Cal. 280). It is superior to a prior judgment, existing or subsequent liens against the mortgagor to the extent of the land purchased and described (27 Cyc. 1180).

ADDITIONAL ADVANCES:

A mortgage or deed of trust stating that it secures additional advances creates a lien for same as against subsequent owners or encumbrancers until actual notice of the junior encumbrance is imparted to the holder of the superior lien.

The amount of such advance need not be stated. Persons interested are placed upon inquiry as to what has been advanced. (35 Cal. 302, 77 Cal. 386, 162 Cal. 300.)

ERRONEOUS DATE:

The date of a mortgage, if material at all, is material only as fixing the time for the payment of the debt secured.

Post-dating the mortgage does not prevent its becoming operative immediately upon its delivery. It creates a present charge upon the property of which subsequent purchasers or encumbrancers are bound to take notice if the instrument is recorded. (27 Cyc. 1077.)

LIABILITY ON NOTE:

A joint note is a note signed by more than one person, the liability is several and the full amount cannot be collected from one signer alone. A joint and several note can be collected from each or all, and any deficiency judgment docketed after foreclosure may be pursued against any of the signers.

When a deed is made "subject to" an existing mortgage, the grantee is not personally responsible for the debt, altho the property may be lost by foreclosure. But if the grantee "assumes" the mortgage, he agrees to pay it, and a deficiency judgment can be had against him.

Assumption of mortgage by purchaser of the mortgaged premises is a new promise to pay. (Daniel vs. Johnson, 61 Pac. 1107.)

ASSUMPTION BY GRANTEE:

Is agreement to pay the mortgage which can only take place under contractual obligation. (167 Cal. 616, 90 Cal. 147; see, also, 120 Cal. 105.)

MERGER:

You will sometimes find property covered by a mortgage conveyed to the mortgagee. There is no presumption of a merger of the lien into the fee title. It is a question of intent (84 Cal. 295). If there are any rights to preserve, equity will keep the lien alive (85 Cal. 280, 121 Cal. 115).

It is well to disclose the intention of the parties to the deed by a recital therein in some such words as follows:

"This conveyance is made subject to a mortgage (describe same) and shall in nowise be construed as a release or cancellation thereof or as a merger of the lien of said mortgage with the title of the above described property."

The mortgage should be shown as an existing encumbrance in a certificate or policy. The same reasoning applies to a deed of trust.

ACTUAL NOTICE OF MORTGAGEE:

It is not enough to ascertain the state of the mortgagor's record title. Actual notice from inspection on the ground is necessary to cover possible rights of parties in possession under an unrecorded contract of purchase or possibly a lease which may contain an option to purchase. Such parties could set up a defense on foreclosure or rest on their rights undisturbed by the holder of the mortgage. (118 Cal. 258, 27 Cyc. 120.) A mortgagee must look beyond the records when he loans to ascertain facts as to possession. (99 Cal. 636.)

PENALTY FOR MISREPRESENTATION:

A married person representing himself as competent to mortgage alone, when in fact the execution of the spouse is necessary, is guilty of felony on giving such mortgage.

ASSIGNMENT, EXTENSIONS, RENEWALS.

A mortgage can be created, renewed or extended only by a writing executed with the formalities required in the case of a grant of real property. (2922 C. C., 85 Cal. 280, 65 Am. St. Rep. 179.)

ASSIGNMENT:

Of the debt secured by mortgage carries with it the security. (2936 C. C., 88 Cal. 319, 65 Cal. 217, 117 Cal. 412.)

The assignment need not be recorded and the mortgage need not be delivered. (109 Cal. 42.)

EXTENSION:

Is a broadening of the security to cover additional advances. (Sec. 2922, C. C.; 120 Cal. 223.)

RENEWAL:

Refers to prolongation of the original contract. It must be in writing, signed by the party to be charged, and supported by a new and good consideration (40 Cal. 117, 131 Cal. 316). If the time extends beyond date of outlawry, or if burden of lien is increased, subsequent encumbrancers must join to be bound (43 Cal. 185). Sec. 2922, C. C., applies only after debt has outlawed. (85 Cal. 280, 120 Cal. 414.) An acknowledgment or promise made before the statute has run vitalizes the old debt for another period; after the statute has run it gives a new cause of action for which the old debt is a consideration (56 Cal. 342).

NOVATION:

Acceptance of a new note and mortgage as renewal of former note and mortgage does not extinguish the latter in absence of evidence that new papers are given to satisfy old ones. (144 Cal. 104.)

But this is always a question of intent which a title company cannot determine or anticipate the finding of the court in any action by the parties to enforce their respective liens. (68 Pac. 484.)

EXTENSION AND OUTLAWRY:

Unrecorded extension maintains lien of mortgage as

superior to second encumbrancer who on foreclosure of mortgage pleads statute of limitations. Facts govern, not records. Third person acquiring lien or interest must enquire if in fact first mortgage has been extended. (134 Cal. 269, Newhall vs. Hatch, also 126 Cal. 198 and 140 Cal. 29.)

In the Newhall case, Hatch mortgaged to Newhall, mortgage was extended within 4 years from due date and was foreclosed after original 4 years had run, but within 4 years of due date under extension. Owner of judgment which attached in lifetime of original mortgage pleaded statute and no knowledge of extension, which was unrecorded. Supreme Court held that it was duty of judgment owner to have ascertained from mortgagee whether the note had been extended in fact.

SUBORDINATION AGREEMENT:

Is not constructive notice of its contents because it is not an instrument affecting title to real property. (28 N. Y. 191, 104 Cal. 130, 5 Cal. 334.) It is a good plan to indorse the subordination on the note itself. (See Jones on Mortgages, 608, and Jones on Real Property, 1588.)

OUTLAWED MORTGAGE:

On the authority of 140 Cal. 29, an outlawed mortgage may be omitted if the title has passed, otherwise such a mortgage should be noted after the description.

A mortgage outlaws four years after its due date.

Unconditional admission of the debt after statute has run extends the lien. (11 Cal. App. 523, Cal. College vs. Stephens.)

DEFICIENCY JUDGMENT WAIVER:

Use this form in the mortgage:

> "It is understood that this mortgage is the sole security for the promissory note set forth herein and that therefore said mortgage specifically waives any deficiency on account of the failure of the security to discharge the whole debt due or to become due."

FORM USED IN MORTGAGE WHEN NOTE IS SECURED ALSO BY DEED OF TRUST:

SAID NOTE is also secured by a certain deed of trust to, ..., a corporation, of even date herewith, and it is hereby agreed that in case of default under said note, the holders thereof may, at their sole option, and without limiting or affecting any rights or remedies conferred upon them by this mortgage or said deed of trust, foreclose this mortgage, or exercise any of the rights and remedies con-

ferred upon them under said deed of trust, either concurrently, or in such order as they may determine, and may sell or cause to be sold, in such order as they may determine, as a whole, or in such parcels as they may determine, the property described in this mortgage and/or in said deed of trust.

MORTGAGE BY ADMINISTRATOR WITHOUT ORDER OF COURT:

Is no part of his duty. Heirs could repudiate it on distribution, but mortgage would belong to administrator individually. (36 Cal. 188.)

ON WIFE'S PROPERTY:

To secure husband's debt. Is good, as married woman has free right of contract. (55 Cal. 15, 139 Cal. 246.)

GROWING CROPS:

The case of Simpson vs. Ferguson (112 Cal. 180) ruled that a mortgage upon the land is limited in its effect, so far as growing crops are concerned, to crops growing upon the land at the time of foreclosure and does not vest in the mortgagee a right to the crop grown between the giving of the mortgage and its foreclosure, but the mortgagor is entitled to such crop and may exercise an absolute dominion over them as if the mortgage did not exist.

The above decision appears to be reversed in the case of Penryn Co. vs. Sherman-Worrell Co. (142 Cal. 643.)

Growing crops unsevered are a part of the realty and pass to the purchaser under a trust deed foreclosure and sale, the purchaser taking as of the date of the trust deed, but as regards growing crops he must make entry and take possession to defeat the right of a chattel mortgage under mortgage subsequent to date of trust deed.

MORTGAGE ON INTEREST OF MINORS:

Such a mortgage must be supported by an order of court.

A minor's interest when mortgaged with other interests must be segregated.

In the case of Howard vs. Bryan (133 Cal. 257) a mortgage given by widow, owner of one-half, and ten minor children owning one-twentieth, each, for one aggregate sum, rendering each minor liable for the whole debt, was held invalid.

Judge Henshaw said "either separate mortgages must be ordered, or the mortgage must specify the amount of the lien and charge against the interest of each minor, and provide for the discharge of the lien as to each particular ward's property upon the payment of that amount."

The mortgage should embody a clause along the following lines where several minors join:

> "The mortgagee, by acceptance hereof, agrees that no one of the interests of said minors shall be held liable for said indebtedness beyond (one-third) thereof and the personal liability of any of said minors shall not extend beyond (one-third) of said indebtedness."

Where an adult and a minor join, adopt this form:

> "The mortgagee, by the acceptance hereof, agrees that.....is the owner of an undivided interest in the property hereinafter described and that the amount of the lien of this mortgage against the interest of said..... is..... of the entire indebtedness herein set forth. It is further agreed that said .....shall be entitled to and the mortgagee will execute a full discharge of said .....interest from the lien of this mortgage upon payment of his proportionate amount of said indebtedness."

A more elaborate recital is as follows:

> "This mortgage and note herein described are made and delivered by....., as guardian of the estate of....., a minor, in pursuance of an order entered on the day of..... 19....., in Case No..... of the Superior Court of the State of California, in and for the County of....., a certified copy of which order is recorded simultaneously herewith in the office of the County Recorder of said County, which said order directs that a mortgage shall be made for the sum of $..... payable..... years from the date thereof, with interest at .....per cent, payable....., covering the interest of said minor, to-wit: An undivided ..... in the property hereinabove described, and the mortgagee, by the acceptance hereof, agrees that the interest of said minor in said property shall not be held liable for the total indebtedness herein set out beyond the sum of $..... thereof, and the personal liability of said hereunder minor shall not extend beyond ..... of said indebtedness."

MORTGAGE JOINED IN BY INCOMPETENT:

Insert in mortgage a recital in this form:

> "As to the interest of ..... in said property, this mortgage is made and delivered by virtue of an order out of the Superior Court of said County of date ..... entered in the matter of the estate and guardianship of said ....., an incompetent person, authorizing the execution thereof and the mortgagee agrees in accepting this mortgage that the personal liability of said incompetent upon said note and her liability on account of said mortgage shall be limited to her interest in the said property."

GUARANTOR:

The obligation of a guarantor of a promissory note is an independent contract on which holder of note may recover judgment without first exhausting the security.

Guarantor would naturally be subrogated to rights of mortgagee securing the note and could foreclose. (5 C. D. 383 of Oct. 14, 1918.) (See, also, 133 Cal. 574, 128 Cal. 464, 119 Cal. 67, 120 Cal. 688.)

GUARANTEE OF NOTE:

The guarantor should sign both above and below the following form on back of the note:

> "I hereby guarantee payment of the within note, or any renewals or extensions thereof, and all expense of collection thereof, and all expense incurred in enforcing this guaranty, and waive demand, presentment for payment, protest and notice of protest, and consent that the time for payment may be extended from time to time without notice to me."

RELEASE AND SATISFACTION:

Full performance of an obligation by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it. (1473 C. C.)

An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the title on deposit. (1475 C. C., 96 Cal. 275, 76 Cal. 465.)

One who holds a mortgage by assignment as collateral security for a sum smaller than the mortgage debt may receive payment, or may compel payment by foreclosure; and holding the

mortgage title, of record he may give a valid discharge. If he collects a sum more than sufficient to pay the debt due him, he will hold the surplus in trust for his assignor. (Jones on Mtgs., 7th Ed., par. 963.)

Lapse of time within which action can be brought extinguishes the lien. (2911 C. C.)

RELEASE BY GUARDIAN:

Ward held mortgage on land of guardian, who released same without charging same in his account and without order of court. Mortgage remains a lien. (30 C. A. D. 408, 726.) An order of court authorizing or approving such a release should be obtained. (55 Cal. 81, 104 Cal. 156, 25 C. D. 502.)

In the absence of a provision in a mortgage for partial release upon the payment of specified sums, no partial release by an executor, administrator, or guardian should be passed.

When there are two or more executors or administrators a release by less than all of them unless they come within the provision of Secs. 1355 and 1425, C. C. P., should not be passed.

REFUSAL TO RELEASE:

A penalty of $100 is imposed on the mortgagee for failing to satisfy the mortgage after payment tendered or to give a satisfaction for record. The tender can be made by depositing it in a bank. (1500 C. C., 35 Cal. App. 325.)

RELEASE BY FOREIGN ADMINISTRATOR:

Sec. 2939½, C. C. (Stat. 1913, p. 216), provides as follows:

> "Foreign executors, administrators and guardians may satisfy mortgages upon the records of any county in this State, upon producing and recording in the office of the county recorder of the county in which such mortgage is recorded, a duly certified and authenticated copy of their letters testamentary, or of administration or of guardianship, and which certificate or authentication shall also recite that said letters have not been revoked."

No such presumption of regularity of probate proceedings obtains as between counties within the State and therefore the proper appointment of the person releasing in his official capacity should be verified by report from the county in which proceedings were had.

FORECLOSURE

ONLY ONE ACTION:

There can be but one action for the recovery of the debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the Code of Civil Procedure.

The action does not quiet title, but affects only such interest as is actually covered by the mortgage. A purchaser with sheriff's deed acquires only such title as the mortgagor had and mortgaged. The decree of foreclosure is good only against those persons properly served and before the court.

If husband mortgages alone and homestead is declared, the wife must be a party defendant.

No levy need be made on foreclosure sale. (94 Cal. 224.)

CROP MORTGAGEE AS DEFENDANT:

Has no rights of redemption as he has no interest in or lien on the land itself and need not be sued. He is a proper party defendant if his mortgage is a junior lien, because the mortgage being foreclosed may cover crops at time of suit.

JUNIOR ENCUMBRANCERS:

A junior mortgagee may set up his mortgage in foreclosure of senior mortgage and have surplus applied to his debt without losing right to foreclose as to other lands. (121 Cal. 294.)

The trustee under a deed of trust is a necessary party defendant and the beneficiary a proper but not a necessary party. (91 Cal. 492, 167 Cal. 459, 135 Pac. 719.) In case of a trust deed securing a bond issue, the trustee represents the many holders of the securities when served in his trust capacity. (See R. C. L. 532 as to necessary parties.) The trustee and the payee shown by the records are the only necessary parties to be sued under 726 C. C. P. and the real owner of the note undisclosed of record need not be sued. (Worden vs. S. Pass Realty Co., 56 Cal. Dec. 1.)

Where a mortgage is foreclosed and the trustee under junior trust deed made party defendant in individual capacity only, decree of foreclosure does not affect integrity of trust deed or foreclosure trustee's right of redemption. (139 Pac. 551, 123 Pac. 139, 127 Pac. 139.) But if the payee is before the court, it is safe to pass the omission. (18 Cal. App. 642, 42 Cal. 439.)

The best practice is to sue the trustee and the record payee of the note.

Where foreclosure is decreed with a junior encumbrancer not sued a separate action may be brought by the owner of the sheriff's certificate to adjudicate his rights, provided the first mortgage is not already outlawed.

As to a junior trust deed not before the court see Watkins vs. Perry, 25 Colo. App. 425, 139 Pac. 551.

As to a mortgage, see 175 Cal. 741, 144 Cal. 246.

FORECLOSURE AFTER STATUTE HAS RUN:

May be maintained if mortgagee makes written acknowledgment of debt. (Catcher vs. Barton, 33 C. A. D. 141.)

NO RECEIVER ALLOWED:

Receiver cannot be appointed under stipulation in the mortgage (115 Cal. 94, 62 Pac. 100) nor during time allowed for redemption (144 Cal. 659).

DEFICIENCY JUDGMENT REDEMPTION:

Before adoption of codes such judgment was no lien on the property sold (Stat. 1859, p. 139). Thereafter the Supreme Court in Simpson vs. Castle (52 Cal. 647) rendered a decision that has been since followed that where the mortgagee purchases for less than the judgment and deficiency judgment is docketed, a purchaser from the mortgagor is entitled to redeem clear of the deficiency; the judgment owner is not "a creditor having a lien" as to the unsatisfied portion of the judgment against the property sold. (See, also, Lantz vs. Fishburn, 120 Pac. 1068.)

Judgment creditor holding deficiency judgment may have execution issue at once on other property of debtor. (16 Cal. 403 at p. 421.)

TITLE AFTER FORECLOSURE:

The above case also held that during the redemption period legal title remains in the mortgagor, but later cases hold that the purchaser takes title with the condition that he may be divested by redemption. The sheriff's deed creates no new title, but is evidence that the title acquired at purchase has become perfect. The right of redemption is created by the statute. (102 Cal. 680, 116 Cal. 230.)

Purchaser acquired a conditional estate subject to be defeated by redemption and takes entire beneficial title except possession. It can be seized on attachment before or after redemption or deed. After redemption period, debtor

holds legal title in trust for vendee. (31 Cal. 294, Page vs. Rogers.)

After foreclosure, debtor has only personal right to occupy and right to redeem and his interest is not subject to execution on a judgment against him docketed after foreclosure. No case found in California, but in Montana, under similar statutes, case so decided in Hamilton vs. Hamilton (154 Pac. 717). (See, also, 138 Cal. 390.)

Purchaser acquires all interest of judgment debtor (700 C. C. P.). The deed is taken as though executed at date when the lien of which it is the sequence originated (75 Cal. 552). The sale invests purchaser with title of mortgagor at date of the mortgage (93 Cal. 600).

The equity of redemption exists until sale, after which debtor has a "right to redeem" if given by statute. (158 Pac. 953.)

The equity of redemption cannot be waived, but can be subsequently conveyed to purchaser on fair terms. (114 Cal. 593.)

After foreclosure the mortgagor may remain in possession until his statutory time for redemption has expired. (114 Cal. 422.)

Rents on foreclosure are payable to purchaser. (707 C. C. P.)

Sheriff's deed issued before redemption period expires is void. (44 Cal. 332, 61 Cal. 331.)

A deficiency judgment cannot be obtained until sale is made. (140 Cal. 80.)

REDEMPTION

Prior to February 26, 1897, the period allowed for redemption was six months. After that date it was twelve months.

Taking assignment of sheriff's certificate of sale by judgment debtor redeems sale. (13 Cal. 79.)

Filing notice of money deposited in bank for redemption on refusal of commissioner to accept same, held good against those claiming under the commissioner's deed. (Mitchell vs. Price, 34 Cal. App. 356.)

By stranger, terminates sale. Sheriff's deed later of no legal effect (134 Cal. 33) and legal title vests in redemption. If original debtor redeems after having deeded out, title vests in debtor's grantee under 703 C. C. P. (See 154 Pac. 714, a Montana case.)

When right to foreclose junior mortgage is barred, the co-relative right to redeem is lost. (95 Cal. 184, 8 Cal. App. 160, 116 Cal. 255.)

Junior mortgagee on cross-complaint and included in judgment is not a redemptioner. (124 Cal. 518.)

All property must be redeemed or none (55 Cal. 534). No redemption can be made as to a part of the premises (149 Cal. 627).

Redemption by one of several owners terminates sale but gives equitable lien against other co-tenants. (138 Cal. 651, 131 Cal. 667.)

"Judgment debtor" includes his successor in interest. (113 Cal. 552, 138 Cal. 390.)

Redemption by debtor terminates sale and certificate of redemption must be given to him. (66 Cal. 117, Calkins vs. Steinbach.)

Successor in interest of judgment debtor is not a redemptioner as defined in the statute, but stands in place of debtor and is included by the statutory words "judgment debtor" (113 Cal. 552, Phillips vs. Hagart). See Oregon case Hiffs vs. McDuffie (158 Pac. 953) on redemption in general under similar statute to ours.

REDEMPTION BY LESSEE:

Lessee under lease made subsequent to mortgage is necessary party to foreclosure and has right to redeem (Sullivan vs. Superior Court, 61 Cal. Dec. 253 of 2-16-21). This overcomes the rule in McDermott vs. Burke, 16 Cal. 580, to the contrary.

Where portion of land leased after mortgage, on foreclosure lessee entitled to ask that unleased portion be first sold and is entitled to redeem. (Mack vs. Shafer, 135 Cal. 113.)

MORTGAGE WITH POWER OF SALE:

At sale, if holder of debt buys, mortgagor has right of redemption, otherwise not.

REDEMPTION:

Redemption by holder of certificate of sale under a junior encumbrance. He redeems as successor in interest if he is entitled to a deed and effect of sale is terminated. (Pollard vs. Harlow, 138 Cal. 391.) But if he redeems before he has both the legal and equitable title under his junior sale and certificate he redeems as a junior encumbrancer and

adverse to original judgment debtor and sheriff's deed to him under original sale will carry new title adverse to original debtor. If year had elapsed after junior sale, the right to a deed thereunder became absolute and the debt on original foreclosure gives no new title. (Duff vs. Randall, 116 Cal. 228.)

Judgment docketed against the debtor both before and after sale on foreclosure. Debtor then deeds to "A", who redeems. "A" takes subject to both judgments. (116 Pac. 504, 51 Pac. 147, 64 Pac. 795, 9 Cal. 413, 14 Iowa 124, 81 Am. Dec. 460.)

Owner mortgages, then gives a trust deed. Mortgage is foreclosed and sale made. Then trust deed is foreclosed with deed by trustee. Held that trustee's grantee is successor in interest to mortgagor for redemption only. While redemption by successor is restoration to original estate, the rule does not apply to purchaser under trustee's deed because purchaser becomes owner of the certificate of sale subject to redemption within the year by debtor (7 Cal. App. 738). Judgment creditors against owner subsequent to trust deed are still redemptioners. See, also, 154 Cal. 513 (9 Cal. 365 before codes), 116 Cal. 226, 156 Pac. 45.

ASSIGNMENT OF SALE CERTIFICATE BY DEED:

A quitclaim deed executed by the purchaser at sheriff's sale, after redemption period had expired and prior to issuance of sheriff's deed, is equivalent to an assignment of the certificate of sale, so that when the sheriff issues his deed thereafter to the purchaser, the quitclaim deed will be good as between the parties. (Ward vs. Doughery, 75 Cal. 240, 17 Pac. 193.)

FUTURE SUBORDINATION:

Only case directly in point found is McCaslin vs. Advance Mfg. Co., 155 Ind. 298 (58 N. E. 67 in 1900), holding that mortgage subsequently recorded was superior to mortgage already recorded because of covenant in the latter allowing a new mortgage to be a prior lien. See 1559 C. C. as to enforcement of covenant.

REDEMPTION BY JUDGMENT CREDITOR, DEBTOR DECEASED:

A judgment creditor does not lose his right to redeem as a junior encumbrancer upon foreclosure when the defendant in the action, being his debtor, is deceased.

BONDS NEGOTIABLE:

When payable to bearer or holder notwithstanding any conditions in instrument securing the same. (Stat. 1921, p. 471.)

MORTGAGE TO PARTNERSHIP:

Mortgage to Reliance Building Co. unincorporated. Certificate of fictitious firm name filed by D. and B. Mortgage was assigned by Reliance Building Co. by D., President, acknowledged by D. as individual. Mortgage is good (27 Cyc. 1085, 187 Pac. 831). A mortgage is not a conveyance which would have been void, but a lien like a mechanics' lien or a judgment and its record gives notice. (101 Cal. 438.) In 32 Cal. 639 mortgage not binding at law was held good as equitable lien. (126 Cal. 467.)

LOANS BY NATIONAL BANKS:

Prior to 1913 has no power to loan on real property (5136/7 Fed. Stat. Ann.). Mortgage not void and Government only could object (191 U. S. 451, 122 Cal. 167). Federal Reserve Banking Act of 1913 allows loans on farm lands up to 50% valuation. In 1914 Sec. 24 of said act was amended to allow loans within 100 miles for one year up to 25% of bank's capital and surplus and 50% of the value of the property.

REDEMPTION:

A judgment debtor can redeem from an execution sale notwithstanding his deed to a third party. (51 Cal. 539, Yoakum vs. Bower.) See, also, 105 Cal. 99.

REDEMPTION:

Successor in interest to judgment debtor can redeem without paying deficiency judgment. He must be a bona fide purchaser. (Simpson vs. Castle, 52 Cal. 647.)

REDEMPTION:

Creditor docketing judgment against "A" after property of "A" was sold on execution is a redemptioner. (Stetson vs. Sheehan, 200 Pac. 387.) The debtor retains sufficient interest during redemption period.

USURY:

The present usury law was an Initiative Act voted on November 5, 1918, in effect December 10, 1918. The legal rate of interest is seven per cent, but interest may be charged "not exceeding $12.00 on $100.00 for one year or for a longer or shorter time". No greater interest than twelve per cent for one year can be charged directly or indirectly and on violation no action can be maintained to recover any interest and the debt cannot be declared due until full contract period has elapsed. Commission is limited to five per cent on $1,000.00 or less amount actually loaned and three per cent on sums over $1,000.00 in full for examinations, views, fees,

appraisals and commissions and for all charges, except abstracts or certificates of title.

USURY LAW UPHELD:

In Blodgett vs. Rheinschild, 37 Cal. App. Dec. 556, on March 6, 1922, the court upheld the law of 1918, the commission charged by lender being added to interest of 1% per month. Lender could collect only original principal when due and damages for unlawful replevin of an auto.

(End of Subject)

POWER OF ATTORNEY

DEFINED:

A power of attorney is an authority given by a person usually called the principal to another called the agent or attorney-in-fact to transact business for him in accordance with the scope of the instrument, to the terms of which the power of the agent is strictly limited. In constructing the instrument, which must be in writing, the authority is not to be extended beyond that which is given in express terms or necessary to convey into effect that which is expressly given. (2 Corp. Juris 556.)

Care should be exercised to determine that the power authorizes the specific act done by the attorney-in-fact, for "when an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned" (2321 C. C.). The exact words in the power relied on for the authorization of the act done by the attorney-in-fact should be set forth by the searcher in his abstract.

PROHIBITED ACTS:

An attorney-in-fact cannot:

Make a gift of his principal's property.
Convey, mortgage or release except for a valuable consideration.
Convey or mortgage homestead property.
Deal with principal's property for his own benefit.
Release or assign a mortgage made by himself to his principal.
Convey his principal's property to himself or to any other person, for his own benefit.
Mortgage his principal's property to himself or to any other person for his own benefit.
Make a partition.

A conveyance under a power of attorney should show the true consideration on its face. The usual recital of "$1.00" is not enough to make a prima facie showing of adequate value received.

Power to sell and convey does not authorize an exchange (134 Cal. 643), but authority to buy and sell on any terms the agent may see fit would be sufficient.

Power to sell is not power to convey (76 Cal. 616).

TERMINATION OF POWER:

Death of principal terminates the agency at common law. (Long vs. Thayer, 150 U. S. 522; 37 Law. Ed. 1167; 41 L. R. A.

661.) This is for the reason that on a man's death, title to his property passes at once to his heirs.

This rule is modified by our C. C. 2356, which provides for termination as to every person having notice thereof by

(a) Revocation by principal.
(b) His death.
(c) His incapacity to contract.

This does not apply to a power of attorney coupled with an "interest" which is seldom used.

GENERAL AGENCY:

A general or universal agency is lawful, but is rarely found. It is usually very short and empowers the attorney-in-fact to perform any act on behalf of the principal and in his name which he can or could do and which can be done for him by another. See 2297 and 2304 C. C. (31 Cyc. 1340, 42 Am. Dec. 612, 97 Am. Dec. 728.)

POWERS BY MARRIED WOMEN:

Prior to April 3, 1863, a married woman could not make a power of attorney. By an act of that date she was authorized to make a power of attorney provided her husband joined with her in it. (Stat. 1863, p. 165.) The act referred to validated all powers of attorney previously made, if duly executed by the husband and wife.

Since January 1, 1873, a married woman can execute a power of attorney without her husband joining therein. (2996 C. C.)

JOINT POWERS:

A power of attorney may be joint or it may be several or it may be joint and several. It has been held that a power of attorney given to two or more persons gives no authority to deal with the joint property of the principals unless the power so expressly provides, except the makers be husband and wife. (50 Cal. 77.) However, under a recent decision of our Supreme Court (Cousino vs. Eastern Shore Lumber Company, 56 C. D., p. 284) an attorney-in-fact appointed under a joint power has ample and complete authority to convey or encumber any interest held by any of the principals, notwithstanding the fact that the power of attorney does not in terms so provide.

See "Husband and Wife" as to the effect of Sec. 172a, C. C., on deeds made under a power of attorney.

This applies to community property acquired prior to the adoption of Sec. 172a, C. C., on July 27, 1917, which calls

for joint execution by husband and wife, and in the construction of which the analogy of the homestead code provisions has been held to apply. Personal execution by both spouses should be required since July 27, 1917.

A power to several attorneys-in-fact with full power of substitution does not authorize one of them to act; if an attorney-in-fact under such power substitutes another in his place, such substitution probably renders the original attorney's power nugatory and prevents him from acting further, and a revocation of the substitution would not reinstate him.

POWERS OVER SEVEN YEARS OLD:

It is not safe to pass a power of attorney over seven years old without inquiring as to whether the donor is alive. There may be a presumption that he is dead. The existence of the donor should be ascertained dehors the record.

(End of Subject)

STAMPS

Documentary stamps are required under the Federal Revenue Acts as hereinafter set out.

The Emergency Revenue Act, effective December 1, 1914, to December 1, 1915, continued in force until September 8, 1916. The United States Revenue Act of October 3, 1917, was effective November 1, 1917, but as to stamps from December 1, 1917.

The Stamp Tax is computed on the following schedule:

On promissory notes and renewals or extensions of same per $100.00 or fraction thereof..... $0.02
(See amendment in effect July 1, 1924.)

On every deed or instrument in writing, granting, assigning, transferring, or conveying realty or an interest therein, when the consideration for the property conveyed, exclusive of liens or incumbrances, exceeds $100.00 and does not exceed $500.00... $0.50

For each additional $500 or fraction thereof... $0.50

On powers of attorney..... $0.25

On proxies..... $0.10

On bonds, debentures or certificates of indebtedness except those issued by Federal, State or Municipal Corporations exercising the taxing power, on each $100.00..... $0.05

On surety or indemnity bonds..... $0.50

On original issue of stock of a corporation per $100.00 face value..... $0.05

On reissue, transfer or agreement of sale per $100.00 face value..... $0.02

Stocks and bonds of cooperative building and loan associations and of mutual ditch or irrigating companies are exempt.

On sale of stock:

(a) Where sale is shown only by books of corporation, stamps must be placed on the books.

(b) On transfer and reissuance, stamp original certificate.

(c) When transfer is by delivery of certificate assigned in blank, a bill must be delivered by seller to buyer showing details of stock and stamps must be affixed to this.

No tax is imposed on any instrument given to secure a debt.

Gift deeds, deeds making partition, and bills of sale require no stamps.

Insurance policies require stamps, one-half of 1% of the premium charged.

CITY DEED:

Exempt from tax under Sec. 1101, Title XI, Act of 1918, which provides that bond, note or other instrument issued by any municipal corporation exercising the taxing power shall not be taxed.

MORTGAGE NOTES EXEMPT:

No stamps required on notes after July 1, 1924.

RULINGS AND REGULATIONS

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is empowered to prescribe regulations for the enforcement of the Act. The Treasury Department at Washington issues its rulings from time to time as to the application and requirements of the same. Among these Treasury Decisions the following affect the title man:

POSTAGE STAMPS NOT SUFFICIENT:

Documentary stamps must be used in all cases. Postage stamps are useless.

CONTRACT OF SALE:

Needs no stamps. The deed when delivered must be stamped to the full amount of the consideration.

STOCKS OF A DECEDENT:

Stocks transferred from decedent to administrator take no stamps, but transfer from administrator to the heirs must be stamped as per schedule.

POWER OF ATTORNEY:

Must be stamped when the power is accepted, not when it is exercised.

the old mortgage is released and a new mortgage given, the extension agreement should be stamped at 2¢ per hundred until the amendment in effect July 1, 1924, exempting such notes.

VENDOR'S LIEN:

Under decision of Jan. 11, 1915 (T. D. 2123) the amount of a vendor's lien retained in a deed may be deducted from the purchase price for computing stampable value, and unless the purchase money mortgage or lien is evidenced in the deed as being part of the consideration, the same cannot be deducted.

DEDUCTION OF ENCUMBRANCES:

In determining the amount of encumbrance upon real estate being transferred, no consideration is to be given to new encumbrances placed upon the same at the time of or after the sale. "Only encumbrances which rest on the property before the sale and which are not removed by the sale are to be taken into consideration." (T. D. 2599 of Dec. 3, 1917.)

RECORDED INSTRUMENTS, INSUFFICIENT STAMPING:

This defect may be readily corrected. The original document must be presented to the county recorder and the necessary additional stamps affixed and canceled. The recorder will then make an entry upon the record of the instrument showing that such additional stamps have been attached since the original filing. The Collector of Internal Revenue advises that the proper amount of stamps should be purchased by the grantor and delivered to the grantee to be attached to the deed or other paper and unless the transaction appears upon the public records his office should be notified. Where the above method is impracticable the instrument with the additional stamps may be rerecorded with a notation attached in explanation.

FEDERAL FARM LOAN MORTGAGES:

These are exempt under Sections 2 and 26 of the Federal Farm Loan Act of July 27, 1916.

RECORDING DEEDS WITHOUT STAMPS:

It is not considered good practice to state on a deed filed for record "The consideration for this deed does not exceed $100.00", except in special cases such as with quitclaim deeds given to correct errors in previous conveyances. Such a recital might cast doubt upon the validity of the transfer of valuable property when transcribed on the records. A pencil memorandum to the recorder is sufficient.

A Washington decision under the Revenue Act advises: "It is not the duty of the county recorder to insist on the proper amount of stamps being attached. If he is not satisfied, it is his duty to notify the Collector of Internal Revenue, and he can demand an affidavit showing the true consideration."

(End of Subject)

TAXES AND ASSESSMENTS

The first encumbrance shown in a guarantee is that of taxes. These were formerly divided into two heads, State and county taxes, and city taxes. At the general election of November, 1910 (Amendment No. 1), the State Constitution was changed to permit of the segregation of State and local taxation, the State drawing revenue principally from a percentage of the gross receipts of public utility corporations, insurance companies and banks, and by assessment of the franchises of all other corporations organized for profit. The first Corporation Franchise Tax Act was passed in 1911 and has been amended several times since. We therefore have to consider three sorts of taxes in writing a certificate or policy: State, county and city.

The State taxes only concern us when the property was owned by a corporation on the first Monday in March of any year when the franchise tax attaches and on the first day of January of any year because since January 1, 1918, the license tax has been a lien on all property owned by a corporation on said date.

CORPORATION TAXES:

Public service corporations are taxed on all their possessions (except non-operative property) for State purposes alone. Other corporations pay taxes to the State on their franchises only, and on their other property to county and city as formerly.

CORPORATION FRANCHISE ACT:

Original Act passed in 1911 (Stat. 1911, p. 530), and amended each session since, levies a tax on franchises which include the right to be a corporation and to do business. The tax is payable to the State Treasurer in two installments: The first half on the first Monday in July (delinquent six Mondays later with 15% penalty added) and the second half up to the first Monday in February (after which 5% penalty attaches to all unpaid amounts). The lien created has the effect of an execution duly levied and is not removed until taxes and penalties are paid or the property is sold to make the amount due. While the tax attaches the first Monday in March, it covers the fiscal year from July 1 to the following June 30.

If taxes remained unpaid, as the act stood until the amendment of 1917, forfeiture of charter as to domestic corporations, or of right to do business as foreign corporations, occurred at 6:00 p. m. of Saturday before the first Monday in the following March.

By the amendment in force May 11, 1917 (Secs. 3664 et seq., Pol. Code), the penalty for non-payment was changed to

the effect that as to domestic corporations their corporate powers are suspended except to defend an action in Court, and as to foreign corporations their right to do intra-state business is forfeited.

CORPORATION LICENSE ACT:

Original act passed in 1905 (Stat. 1905, p. 493) and amended each session since. This tax was not a lien on real property, but the forfeiture for non-payment must be watched as affecting the right to take, hold or convey property. In 1913 the entire act was repealed, effective June 30, 1914, but reinstatement of defunct corporations was protected. A new act came into effect with a tax due on January 1, 1916, not a lien on real property to be superseded by the Act passed May 11, 1917 (dovetailing in with the Franchise Act amendments of same date), by which the tax due January 1, 1918, was made a lien on real property, and covers the calendar year from January 1 to December 30. This tax is due January 1st, becomes delinquent the first Monday in February at 6:00 p. m. (with $10.00 penalty for delinquency). Instead of forfeiture for non-payment, corporate powers are suspended and can only be exercised to execute deeds in fulfilment of prior contracts and to defend actions in court (note the difference between this and the franchise disability). Foreign corporations lose the right to transact intra-state business. Suspension occurs at 6:00 p. m. on Saturday before the first Monday in March.

Under amendments of 1921 a penalty was added covering the amount for each year after suspension.

A fine of $500.00 was imposed for failure to comply and the contract of a foreign corporation was declared void but enforcible against it. (Stat. 1921, p. 640.)

The License Act does not apply to corporations in the exempt list which include those organized for educational, religious, scientific or charitable purposes, those not organized or conducted for profit, foreign corporations doing solely interstate business, and those corporations taxed under Constitutional Amendment No. 1, and which include public utility, insurance and banking corporations (but not water companies).

The official list of suspensions and forfeitures is not available for six or eight weeks thereafter and during this period the standing of corporations must be ascertained locally or from Sacramento when the search demands it. When the official list of suspensions and forfeitures is issued, the fact that a corporation is not listed therein is sufficient evidence that back taxes have been paid for the year covered by the list.

OIL PROTECTION STATE TAX:

In effect August 9, 1915. (Stat. 1915, p. 1404.) Affects operators of oil and gas wells and lands within two miles "as near as may be". Assessed against owners of property on first Monday of every March; tax roll goes to State Controller first Monday in July and payments are made as under State franchise tax. Tax remains a lien until paid.

The amendment of 1917 (Stat. 1917, p. 1586) enlarges scope of act. The State is divided into five districts. On the third Monday before the first Monday in each July notice is published in the papers of assessments made. After receipt of rolls Controller publishes a notice daily for five days. Assessments are a lien on all property of all persons assessed attaching on first Monday in previous March and the lien follows the property. Suit for collection must on or before the 30th of May following be brought in the county where the property is situated to collect amounts due.

Amended in 1919 (Stat. 1919, p. 1165) as to other than tax provisions.

FEDERAL TAX LIENS:

Sec. 3186 of U. S. Revised Statutes, #5908, provides that any Federal tax unpaid after demand becomes a lien on all property and rights to property of the person liable therefor from the time the assessment list was received by the collector, valid against any mortgage, purchaser or judgment creditor when notice thereof is filed with the clerk of the District Court of the district where the property is situate. Any State may authorize filing of such notice in the county recorder's office in lieu thereof. Congress passed an Excise Tax Law (approved Mar. 4, 1913) affecting corporations in default, and see also the Excise Tax Law approved October 3, 1917, Title VI, Sec. 600a, as to income tax liens which are filed by the Internal Revenue Collector with the clerk of the District Court. The entries are made in the book of tax liens and show only the original tax which carries a penalty of 5% and draws interest at 1% per month. The collector can give a release of same upon estimate which he supplies.

COUNTY TAXES:

Taxes become a lien at 12 o'clock noon on the first Monday in March of each year (#3717, Pol. Code) and cover the succeeding fiscal year from July 1st to June 30th.

PAYMENT, DELINQUENCY, SALE:

County taxes are payable in two installments, both payable on the third Monday in October of each year, the first

half (which includes all the personal property tax) becomes delinquent on the first Monday in December at six p. m., when 15% is added. The second half is delinquent on the last Monday in April at six p. m., when 5% is added to all amounts unpaid. Advertising the sale starts June 5th and extends for three weeks, after which all property in delinquency is declared sold to the State of California early in July and is so marked on the rolls. Penalties and interest at 7% are added after the sale, the property being assessed as usual thereafter for four years. Five years after the original sale to the State, the property, after legal advertisement thereof, is offered at auction, unless it has been previously redeemed prior to or on the day of sale upon the auditor's estimate, and is struck off to purchasers, who are allowed thirty days' exclusive right of paying and redeeming all back taxes and taking a deed. Upon such a sale as this searchers must be careful to bear in mind that, although the taxes for the four years after the sale to the State are stamped on the rolls as "Redeemed", such redemption is made on behalf of the holder of the tax deed and not for the record owner.

The same procedure has been officially adopted by several cities as to their city taxes, which are added in with the county taxes and both are collected as one amount. (See Act 4067c, Stat. 1913, p. 499.)

PERSONAL PROPERTY TAX:

Unsecured personal property taxes are payable on demand to the assessor. Personal property taxes of persons also assessed for real estate can be charged when assessed against any parcel of real property owned by such persons, in which case the realty tax will not be accepted unless the personal property tax is paid also. This is of importance to purchasers who assume taxes on land acquired as per their escrow instructions without any intention of paying the seller's personal property tax.

Personal property is taxable at place of domicile of the owner, but where title is vested in a trustee, the beneficiary living elsewhere, the trustee is deemed the owner for purposes of taxation. (See Mackey vs. San Francisco, 128 Cal. 678, 61 Pac. 382.) This appears to apply to stocks of foreign corporations held by a trustee here.

ORDER OF ENCUMBRANCES:

Next after current taxes, set up unpaid taxes if any, county and city; then any sale to the State and city, and then sales to individuals, county sales preceding city sales. Sales to individuals where no deed has been issued can be ignored (3785 Pol. Code, amended March 23, 1907), the purchaser being deemed to have relinquished all his rights under the sale. This does not mean that the deed must be recorded, the

act merely says it must have been "made". Unless the assessment upon which a sale is based is against the owner of record, look out for a double assessment and, if found, have the sale canceled, remembering that in former years assessments were often carelessly made.

TAX SALE, REDEMPTION OF PART ONLY:

Proceed under 3818 Pol. Code as amended and in force 1917. If no separate valuation on roll, auditor will estimate amount for redemption. Notice to be sent by registered mail to party assessed who has right to protest.

Tax sale to State never outlaws. Sec. 3788, Pol. Code, does not apply to State. (117 Cal. 695.)

PRORATING OF TAXES:

This is a matter of arrangement and agreement between buyer and seller. A definite statement should be called for by an escrow holder. In 1911, owing to controversy and disputes, the following procedure was adopted throughout the South by all title companies:

Rules governing prorating of taxes:

> On and after September 14, 1911, in all realty transactions, taxes shall be prorated from July 1st to July 1st, and if prorating is done prior to the first Monday in October, it shall be done on the basis of last year's taxes.
>
> If improvements have been added prior to the first Monday in March, add to the assessed value 50% of the value of improvements and calculate on the basis of last year's tax rate.
>
> Any prorating after the first Monday in October shall be done on the current assessment as shown by the city and county records.

TAX SALES ON PUBLIC LANDS ON WHICH FINAL PAYMENT HAS NOT BEEN MADE:

Where the possessory interest of a person not entitled to patent for lands, either of the United States or of the State of California, has been assessed and later sold to the State for non-payment of tax, note the sale after description, thus:

NOTE: In book..... page ..... of tax sales, County Tax Collector's records, appears the record of a sale of said land to the State of California for (State and) county taxes of the fiscal year..... Amount of sale $..... Said land being assessed as the property of John Doe. At the date

of said assessment, the title to said land was vested in the United States (or in the State of California) and said John Doe was not at that time entitled to a patent (or said John Doe and his successors in interest never became entitled to a patent). Proceedings under Sec. 3805a of the Political Code should be taken to cancel said sale of record.

SERVICE BY PUBLICATION BY TAX TITLE AGAINST RECORD OWNER:

Do not ever vest under a judicial decree brought by holder of a tax title against the record owner where service of summons was made by publication or otherwise than personally; vest in the record owner, set up the tax sale and title as an encumbrance in the usual way and follow it by a note covering the suit and decree.

TAX EXEMPTION:

Ex-soldiers, their widows or dependents, residents of California, are entitled to a deduction of $1,000.00 from the assessed valuation of their property, provided the estate value, wherever located, does not exceed $5,000.00, and provided the claim for deduction is made each year on making return to the assessor.

POLL TAX:

The poll tax was abolished Dec. 19, 1914, at the election of 1914 by initiative amendment to the State Constitution. (Stat. 1915, page 1923.) This does not affect the poll tax of 1915, which was a lien when the amendment became effective.

U. S. EXCISE TAX:

The Act of Congress approved March 4, 1913, provides that if corporations fail to pay their annual excise tax, upon delinquency, the Collector of Internal Revenue for each district shall file a statement of amount due with penalties with the clerk of the U. S. District Court for that district, which thereupon becomes a lien on all property of the corporation in that judicial district. When found these taxes must be shown as an encumbrance in the guarantee. The fiscal year runs from July 1 to following June 30 and is assessed against the fair market value of the stock.

STREET BOND:

Payment before due date. Stat. of 1917, p. 160, Chap. 116, amends Vrooman Act of 1893 by allowing discharge of lien by paying the city treasurer unpaid principal, accrued interest, the next interest installment and six months' interest on unpaid principal. The treasurer to enter full payment on his bond register.

IRRIGATION DISTRICT TAX SALES:

Under Act of 1887 (Stat. 1887, p. 29) redemption may be made within 12 months. Sec. 3785, Pol. Code, relating to general taxes and providing that deeds must issue in 12 months, does not apply, being distinct from the laws governing irrigation districts. A purchaser's interest under a sale is not terminated by failure to procure deed.

STREET ASSESSMENTS, PRIORITY OF LIEN:

It has been decided in the case of Woodhill and Hulse Co. vs. Young et al., that: "The last assessment imposed is the paramount lien, as between liens and not regarding the ownership of the land." (Cal. Dec., Vol. 58, of July 15, 1919, p. 42.)

COUNTY WEED TAX:

(Stat. 1921, p. 1690, in effect Aug. 2, 1921.) Board of supervisors declares nuisance, issues order to abate, publishes and mails to assessed owner. Board may do work and file notice of lien in recorder's office. Action may be brought within 90 days. (Treat like mechanics' liens.)

BONDS:

When amount of an assessment is $25.00 or over on work done under the Bond Act, the assessment automatically goes to bond 30 days after date of lien. Said bonds are recorded in city treasurer's office and draw 7% per annum, payable semi-annually on January 2nd and July 2nd of each year. Principal payable in ten equal annual installments on January 2nd of each year. Owner of bond can demand property sold as soon as delinquent for total unpaid amount plus the amount of interest up to the end of ten years. (Time bond would expire.) Bonds may be paid in full and cancellation obtained through city hall upon payment of unpaid balance of the principal plus 14% thereon and plus all unpaid accrued interest together with the installment of interest next to become due. When amount of assessment is less than $25.00 it is treated same as cash lien.

(End of Subject)

TRUSTS

PERMISSIBLE TRUSTS:

The common law doctrine of Uses and Trusts has been abolished in California, and the Chapter on Trusts defines the only trusts allowed. (C. C. 857 et seq.)

Express trusts may be created for any of the following purposes as set out in Sec. 857, C. C.:

1. To sell and convey real property and to hold or reinvest or apply or dispose of the proceeds in accordance with the instrument creating the trust.

2. To mortgage or lease real property for the benefit of annuitants, or devisees or legatees, or other beneficiaries, or for the purpose of satisfying any charge thereon.

3. To receive the rents and profits of real property, and pay them to, or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term (subject to the rules of title 2 of division 2 of part 1 of this code).

4. To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the same title.

5. To convey, partition, divide, distribute or allot real property in accordance with the instrument creating the trust, subject to the limitations of the same title.

Subdivision No. 5 above was added in 1913 (Stat. 1913, p. 438), prior to which time a trust to convey was invalid. (Estate of Fair, 132 Cal. 523.) Trusts are valid only as authorized by the code (171 Cal. 449).

TRUSTEE'S POWERS LIMITED TO TRUST:

Every act of the trustee is void unless within the powers given and covered by the instrument creating the trust (870 C. C.). Power to sell and convey does not give power to exchange (134 Cal. 641, 3 Cal. App. 371). "Sale" means transfer for a money consideration. But distribution to a trustee with power to sell and reinvest the proceeds in other lands gives power to exchange (154 Cal. 145, 14 Cal. 540).

Trust in a will under which real property was devised to a named trustee "with power to invest and reinvest", implies power to sell said real estate and turn it into cash (134 Am.

St. Rep. 537). Title taken by the trustee under a will is only sufficient for the execution of the trust (Est. Ruth, 28 Cal. 216). But where the will is construed in the decree of distribution the decree becomes a conclusive adjudication of the validity of the disposition made by the testator. (119 Cal. 139, 119 Cal. 344.)

NOTICE OF TRUST, USE OF WORD "TRUSTEE":

Deeds are sometimes found running to "John Smith, Trustee". Does the word "Trustee" give notice of a trust or is the word unsupported by any qualification, merely descriptive? In the absence of a direct decision involving real estate, it is the custom of title companies to make some investigation before passing a deed from such a grantee. Safety dictates that such a deed should be executed by "John Smith, Trustee, John Smith and Mary Smith, his wife". It has been decided that the word "Trustee" following a person's name in a stock transaction does not impart notice of any trust. (42 Cal. 139, 48 Cal. 99, 163 Cal. 769.). The decisions apply to personal property only. (163 Pac. 47.)

Sec. 869, C. C., and Sec. 869a (in effect August 17, 1923), would seem to imply that the words "Trustee" or "as Trustee" following the grantee's name impart no notice, but the language is not as clear as it might be and it must be remembered that a trustee takes only sufficient title to carry out the duties of his trust, leaving possibly some title or remainder in the grantor.

"Trustee" added to a name is more than descriptive (Jones #223, Devlin #210; 41 Am. St. 224). But see C. C. P. 1963, Sub. 37. It was decided in 128 Cal. 362 that a deed to "William Blankman, Executor" gave sufficient notice to put one on enquiry. (See, also, 101 Cal. 387.)

A patent running to "B, trustee" was held to impart no notice of any trust where "B" paid the money (100 U. S. 58). A patent to "A, administrator of B, deceased" vests title in "A" (32 Cal. 202) and deed by "A" is good to pass title.

"Trustee" following the signature on a promissory note means nothing (122 Cal. 28). It is the promise of the person who signs.

Where the name of the beneficiary is disclosed, the case is different. (See Wittfield vs. Forster, 124 Cal. 418.) Where a deed runs to "B as trustee in trust for C" there is a clear intention to create a trust, but the trust is void, its purposes not being clearly indicated as required by Sec. 2221, C. C., and either no title passes or a resulting trust remains in favor of the grantor, since a trustee takes only such estate as is necessary to carry out the terms of the trust, leaving the re-

mainder of the title in the grantor. But if a consideration passed, then the trustee holds under a resulting trust for the person who put up the consideration, under 853 C. C.

"Trustee" after the name of a depositor in a bank gives notice of a trust. (Keeney vs. Bank of Italy, 33 Cal. App. 515.)

Under Section 1213, C. C., a recorded conveyance is constructive notice of its contents, the word "Trustee" being a part of the contents, the title man should protect his vesting by enquiring of the alleged "Trustee" as to the nature of his trust and its scope and powers. He will be protected on the information given where he has no knowledge to the contrary. (Sternfels vs. Watson, 139 Fed. 505.)

It is doubtful if enquiry outside the records is sufficient to make a marketable title, as such a deed destroys marketability. It at least makes it obligatory on all subsequent purchasers to protect themselves by enquiry.

MORTGAGE TO TRUSTEE:

When mortgage runs to Smith, trustee, the mortgagee has power to release. If he is not trustee (trust being undisclosed), he is accountable to beneficiaries only.

DELEGATION OF POWERS:

A trustee cannot delegate his trust powers unless the trust so provides; he can delegate ministerial powers such as signing documents after a deal is settled. (39 Cal. 287.) He cannot assign the trust. (28 Enc. Law 767, 8 S. W. Rep. 523, 66 Ill. 438, 39 Mo. 13.)

ALL TRUSTEES MUST SIGN:

Co-trustees with power of sale cannot execute separate deeds because no one trustee can convey any part of the trust property. (Perry on Trusts. Sec. 412, 18876 N. S. 645, 860 and 2268 C. C.)

APPOINTMENT OF NEW TRUSTEES:

If the instrument creating the trust makes no provision for any substitution or succession of trustees, and the named trustee dies, becomes incapacitated or refuses to act, the Superior Court, on petition, must make the appointment. (2287 C. C.)

IDENTITY OF TRUSTEES:

May be established by short court proceedings under new section 402, C. C., in effect July 29, 1921.

FIDUCIARY CAPACITY:

A trustee, guardian, executor, officer of a corporation, or any other person in a fiduciary capacity cannot, in his official capacity, deal with himself in his individual capacity. A person cannot be trustee for himself. (80 Cal. 237, Kerr Cyc. 2287.)

A trustee, guardian, executor or administrator cannot release or assign a mortgage made by himself, unless he first obtains an order of court, authorizing the same; neither can persons in such capacities convey or mortgage property to themselves. (Moore vs. Gould, 151 Cal. 728.)

TRUST CAPACITY OF EXECUTOR:

It is beyond the power of an executor to make a voluntary admission that his testator, who owned the record title to real property, only held said title as a trustee. (50 Cal. 571, 74 Cal. 436, 112 Cal. 387.)

LEASE OF TRUST PROPERTY:

Cannot be made beyond existence of trust. Is valid so far and void as to excess term. Power to pay rents to beneficiaries implies power to lease. (33 C. A. D., Gartner vs. Isaacs; 12 Cal. App. 449, South End W. Co. vs. Lavery. See, also, 73 N. E. 1127.)

CLAIM OF TRUST INTEREST BY STRANGER:

Notification to a trustee by stranger to record title that he claims an interest in the land is beyond the purview of trustee's agency and good title passes to purchaser under a deed from the trustee. (52 Cal. Dec. 419.)

The whole title vests in the trustee, the beneficiaries take no interest in the property, but may enforce the performance of the trust. (868 C. C.)

TRUSTEE SUED AS INDIVIDUAL:

When sued as an individual, the trust powers are not impaired, personal interests only are affected. So held in Colorado. (123 Pac. 139, 127 Pac. 139, 139 Pac. 551.) Our courts decided "Hudson individually is not Hudson, Receiver", in 18 Cal. App. 642 and 45 Cal. 439. A decree against individuals does not affect their rights as trustees of a corporation. (Warden vs. S. P., 56 Cal. Dec. 1.)

BENEFICIARY UNIDENTIFIED:

Deed to trustee for an unincorporated association with no power to sell is void. (124 Cal. 418.)

TRUSTEE PROPER PARTY TO ACTION:

A legal title is vested in the trustees for the purposes of the trust; they are the proper parties to an action, and not the beneficiary. (Warren Co. vs. All Persons, 153 Cal. 774.)

FORECLOSURE OF BENEFICIAL INTEREST:

Title remains undisturbed in the trustee. The execution and sale of the beneficial interest is no lien on the land itself. (111 Cal. 628.)

FOREIGN TRUSTEE:

Held not authorized to maintain an action as such in this State. (Iowa and Cal. Land Co. vs. Hoag, 20 C. D. 101, 132 Cal. 627.)

The California Bank Act prohibits corporations doing a banking business and includes trust companies, the acceptance of any express trust, court or private being defined as "Banking", except that any person or corporation may hold money in escrow pending investment or may act as trustee under deeds of trust to secure obligations solely for the repayment of money other than corporation bonds (Sec. 101).

PERPETUITY:

A trust is void if by any possibility it may suspend power of alienation beyond legal period. (Est. of Caverly, 119 Cal. 409 and 124 Cal. 537.) This does not apply to a charitable trust.

STATUTE OF PERPETUITIES:

The absolute power of alienation cannot be suspended (except in one specific instance of a contingent remainder in fee in 772 C. C.) by any limitation or condition beyond the lives of persons in being at the creation of the limitation or condition (715 C. C.).

This section has been amended to extend to lives in being or 25 years.

CHARITABLE TRUSTS:

A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large or of a community, or of some class forming a part of it, indefinite as to members and individuals.....It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals and religious institutions, are included within its scope. (People vs. Cogswell, 113 Cal. 129.)

Secs. 847 and 457 of the Civil Code apply only to private trusts and not to trusts for charitable uses. (Est. of Sutro, 155 Cal. 727.)

Charitable trusts are valid in this State. (Est. of Hinckley, 58 Cal. 457.)

Donations for the advancement of religion are charitable donations. (In re Hewitt, 94 Cal. 376, 58 Cal. 457.)

Courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect, if it can be done consistently with the rules of law. A bequest intended as a charity is not void and there is no authority to construe it to be legally void if it can possibly be made good. (Estate of Hinckley, 58 Cal. 457; Estate of Willey, 128 Cal. 1.)

See, also, Estate of Upham, 127 Cal. 90. A money bequest to a Natural History Society was considered charitable and upheld in Winchester Estate. (133 Cal. 271.)

CANNOT SELL WITHOUT COURT ORDER:

Trustees of a charitable trust cannot sell without court order.

Where a power of sale has not been expressly or impliedly given to a trustee of a charitable trust or a court of equity has not given its sanction, the trustees are without power to alienate. (11 Corpus Juris 354.)

Despite any lack of power that may exist in a trustee, it is recognized that a court of equity has a general and inherent jurisdiction as incidental to the administration of a charitable estate to order the alienation of charitable property in a proper case. (11 Corpus Juris 354, citing many cases.)

A court of equity has jurisdiction to decree a sale of property held in trust for charitable or religious purposes when, in its opinion, the objects of the trust would be more effectually carried out by such sale. (Alemany vs. Wensinger, 40 Cal. 288.)

When the court directs an alienation of property given by a testator to a charity, the alienation takes place, not by the trustees in the exercise of the power under the will, but by force of a decree of the court rendered in the exercise of its judicial power of administration in respect to charitable trusts. (Landland vs. Walker, 151 Mo. 210; 52 S. W. 414.)

SOME EXAMPLES:

Deed to trustees (naming them) in trust for the United

Brethren in Christ (not incorporated) for camp-ground, meeting house, and parsonage purposes, was held to pass the legal title to the trustees or the survivors of them. The quarterly conference of the church did not transfer title from the old to new trustees. (Horsman vs. Allen, 129 Cal. 131.) (See, also, 154 Cal. 640.)

A deed to trustees (not naming them) of an unincorporated church is not a valid conveyance, as there is no grantee. (114 Cal. 295; Jones on Real Property, 237-8, and Devlin on Deeds, 120-A.)

A bequest to the board of trustees of a religious society, to be "used for missionary purposes" and be "equally divided between foreign and domestic missions", is a bequest in trust for charitable uses, within the meaning of Section 1313 of the Civil Code. (In re Hewitt, 94 Cal. 376.)

Deed to seven trustees of the "M. E. Church of U. S. A.", so drawn in error, can be amended by action and decree against the trustees and the Attorney-General as representing whole body of beneficiaries. (85 Cal. 488, 9 L. R. A. 748.)

Deed to A, B and C, trustees of religious body later incorporated. Deed creates a charitable trust. Secs. 847 and 857, C. C., do not apply. Trustees or survivors hold title, or if all deceased, then Superior Court must appoint a successor. (Horsman vs. Allen, 129 Cal. 131.) Trustees have no power to convey and 598 C. C. does not apply. The court in equity can authorize a sale and conveyance in an action against the corporation by the trustees and order application of proceeds to religious purposes consistent with the trust. (40 Cal. 288.)

If new trustees have been elected to represent the congregation or members, they may have the right to object and are proper parties defendant in an action to obtain leave to sell. But trustees, survivors or successors can deed direct to the beneficiary corporation, as they hold the bare legal title and corporation can then proceed under 598 C. C. and sell under order of court.

TRUST DEEDS

DEFINED:

Trust deeds given as security for loans was upheld in Sacramento Bank vs. Alcorn. (121 Cal. 379.)

A deed of trust to secure a debt is not a mortgage, but passes the legal title to the trustee for the purpose of the trust, which remains in him until the debt is paid or a sale is made of the premises, and the fact that the note secured is outlawed does not affect the title of the trustee,

or his power to sell to pay the debt. (Travelli vs. Bowman, 150 Cal. 587.)

The debt secured does not outlaw. (54 Cal. 298.)

A deed of trust of land executed for the sole purpose of securing an indebtedness of the grantor, and empowering the trustee to sell the property in order to obtain money for the payment of the indebtedness, is not a mortgage and is a valid trust deed under Sub. 1 of Sec. 857, Civil Code. (Younger vs. Moore, 155 Cal. 767.) (See, also, More vs. Calkins, 95 Cal. 771.)

A trust deed is a mortgage with power of sale in its nature, the trustor retaining all incidents of ownership. (153 Cal. 57, 94 Pac. 604, 121 Cal. 379.)

LEGAL TITLE PASSES:

A trust deed does not create a mere lien or encumbrance, but vests the legal title to the property in the trustee for the purpose of the trust, leaving in the trustor, his successors or assigns, the equitable title. (C. A. Warren Co. vs. All Persons, 153 Cal. 771.)

RIGHTS OF TRUSTOR:

A trust deed conveys no right of possession. Its execution does not abandon a recorded homestead or the filing of a homestead declaration which the trustor may maintain against his creditors not secured by the trust deed or some valid lien. (70 Cal. 236, 153 Cal. 97.) In practical effect a trust deed differs from a mortgage only in that no action at law is necessary to foreclose it and there is no right of redemption after sale on default. Our Supreme Court has said: "Trust deeds to secure payment of a debt are an anomaly in our system and are admittedly inconsistent with the policy of this State in regard to mortgages. It is at least doubtful if they would be now sustained but for a line of decisions made before they were very seriously questioned."

TRUSTOR OR BENEFICIARY MAY ACT AS TRUSTEE:

Though ordinarily a cestui que trust should not be appointed trustee, yet a beneficiary is not absolutely incapacitated from being a trustee, and the trust is not invalid. (Nellis vs. Rickard, 133 Cal. 617.)

A person may act as trustee of the trust created by himself. (Cahlan vs. Bank of Lassen Co., 11 App. 540.)

It is possible for one who owns property to so deal with it, while retaining the legal title, as to make himself a trustee for the benefit of another. (Noble vs. Learned, 153 Cal. 251.)

Trust deed to official of bank as trustees to secure a note held by bank at time of foreclosure is not invalid. Trustee must act fairly. (Portola Realty Co. vs. Carlston, 32 Cal. App. 282.)

It was held in Kinard vs. Kaelin (22 Cal. App. Rep. 383-391) trustee may have an interest in sale of the property secured in the absence of fraud, the creditor himself may act as trustee and may purchase at his own sale. In Roberts vs. True (7 Cal. App. Rep. 379) the payee was also trustee. It was held that this did not affect his right to a sale of the property. See, also, Kraft Co. vs. Bryan (140 Cal. 73), also Mayhall vs. Eppinger (137 Cal. 5). The court would no doubt scrutinize closely the acts of a trustee under a sale to himself.

A trust deed for the security of the payment of a debt, wherein the beneficiary and trustee are the same person, comes within Sec. 858 of the Civil Code. Wherein the "power of sale" is held to be part of the security which takes it out of the usual category of trusts and it is held to pass to an assignee of the debt itself. (See, also, Secs. 2932 and 2936, C. C.)

An assignment of the "Trust" under the above section is not sufficient; the note and debt secured thereby should be assigned.

ASSIGNMENT BY BENEFICIARY:

A trust deed note may be assigned absolutely or as collateral security by endorsement on the back of the note. Notice of same should be given to the trustee.

ADDITIONAL ADVANCES:

The law does not require that a definite statement of the amount to be loaned additionally be set out. (Buck Co. vs. Buck, 162 Cal. 300, also 21 Cal. 637.)

Where deed of trust contains optional advancement clause, advances made to trustor after he has deeded the land are not secured by the trust indenture. Trustee has no right to sell for default, except as to the original note, and trustor may recover from trustee the excess above the note if the note owner bids in the property. (30 C. A. D. 412.)

ACCEPTANCE OF TRUST:

Omission of trustee's signature does not invalidate a deed of trust. (90 Cal. 25.)

TRUST DEED BY ATTORNEY-IN-FACT:

Power "to mortgage" does not include power to execute

a deed of trust, but power "to hypothecate upon such terms as the attorney may see fit" is usually deemed sufficient for that purpose.

CORPORATION AS TRUSTEE:

A corporation can only act as trustee under a deed of trust if its articles of incorporation so empower it. (See Bank Act.)

CONVEYANCE FROM TRUSTOR TO TRUSTEE:

A conveyance from the trustor to the trustee does not necessarily constitute a merger of title, and a certificate or policy should show the trust deed as an encumbrance or exception in the usual way. Do not presume a merger unless there is a positive declaration of parties that merger is intended.

A note may be inserted in the certificate by way of explanation to the following effect:

"Note. Subsequent to the date of the trust deed above shown, the owner of these premises conveyed the property to the trustee named therein. If it is desired to eliminate the trust deed from the records, an instrument should be filed showing that the debt secured is paid, or that the beneficiary acknowledges full satisfaction thereof."

DEFAULT AND SALE

CANNOT BE FORECLOSED:

An ordinary trust deed cannot be foreclosed as a mortgage. (Kreft vs. Bryan, 26 C. D. 332, 140 Cal. 83, but see 92 Cal. 457.)

PLACE OF SALE:

The law declares no particular place of sale on default, leaving it open to contract. 2924 C. C. and 692 C. C. P. are silent. As to right to contract see 161 Cal. 285, also Perry on Trusts, 602, and 27 Cyc. 1476 and 23 S. E. 971 (173 N. C. 60 and 118 N. C. 73), 91 S. E. 525. Laws defining place of sale are not retroactive. (See Texas case in 212 S. W. 647.)

NOTICE TO BE RECORDED:

Sec. 2924, C. C., as amended and in effect July 27, 1917, provides that the power of sale in a mortgage or trust deed cannot be exercised (with certain specific exceptions) until the mortgagee or beneficiary record notice of the breach and election of sale not less than three months prior to the com-

mencement of said proceedings, and notice must further be given as upon execution sale, which means posting and advertising of notice as prescribed by 692 C. C. P. This does not affect trust deeds executed prior to July 27, 1917, though default occurs subsequently. Sec. 692, C. C. P., as amended August 17, 1923, requires posting of notice upon the property 20 days before sale.

NOTICE OF SALE:

Sale on last day of published notice held good where trust deed calls for publication "once each week for four successive weeks". (136 Cal. 3. See, also, 82 Cal. 214, 86 Cal. 126, 104 Cal. 522, 105 Cal. 582 and 112 Cal. 661, also 123 Pac. 139.)

Last publication under terms of trust deed was made 15 days before day set for sale and held "not unreasonably remote" in 23 Cal. App. 449.

POSTPONEMENT OF SALE, NOTICE:

There is usually no provision in the trust deed. There seems to be no California case in point. In Coxe vs. Halsten (2 N. J. Eq. 311) Court held, where statute provides only for publication of time first appointed, that no publication of adjournment was necessary.

In Allen vs. Allen (9 N. J. Eq. 286) proclamation at time and place of sale was held to be sufficient.

In Ferebee vs. Sawyer (83 S. E. 17, N. Carolina), where manner of postponement not provided, reasonable notice is all that is required. (See, also, 58 Cal. App. 174 and 141 Cal. 66, postponement involved and no question raised.)

SALE TO BENEFICIARY:

Sale by trustee to beneficiary corporation, where trustee is a director of said corporation, is voidable. (Herbert Craft Co. vs. Bryan, 23 C. D. 615, 68 Pac. 1020, 133 Cal. 569.)

Trustee may bid in the property for beneficiary. (92 Cal. 467.)

INADEQUACY OF PRICE:

Trust deed for $6500.00, sale for $500.00 (prior mortgage in force for $1500.00), was held not fraudulent in absence of unfairness where trustee was bound to make sale. (Winbigler vs. Sherman, 23 Cal. App. 449.) Sale will be set aside when price paid is grossly inadequate. (99 Md. 584, 128 Ill. 129, 128 Mich. 241, 19 Am. St. Rep. 266.)

Though there is no redemption from the sale (58 Pac. 83), the property was held to be subject to redemption where trustee fixed price for beneficiary and had same bid in. (128 Ill. 129, Cent. Dig. 35-1679.)

SALE OF HOMESTEAD:

If property be part homestead, other property must be sold first. (Humboldt Savings Bank vs. McClunty, 42 C. D. 613.)

TRUSTEE'S RIGHTS:

May be owner of debt, may sell though he has begun foreclosure, or when foreclosure is pending. (137 Cal. 5, Mayhall vs. Ep., 24 C. D. 68.) He may act by attorney or auctioneer. (28 Enc. Law 768.)

TRUSTEE'S DEED:

Recitals are conclusive (139 Cal. 593, 29 Am. Stat. 128, 26 C. D. 183). Trustee need not state his official capacity (107 Cal. 588). Trustee may execute a correction deed (Balfour vs. Woodworth, 56 Pac. 893).

DEFICIENCY AFTER SALE:

Holder of note can sue for balance after sale. (Bk. vs. Copsey, 22 C. D. 272, 22 C. D. 303.)

SURPLUS AFTER SALE:

Payable to trustor or his successor. (27 Cyc. 1498; Jones on Mtgs., 1940; 28 Enc. Law 834.)

BENEFICIARY AS DEFENDANT:

In foreclosing a prior lien mortgage, the trustee is a necessary party defendant, and though the beneficiary may not be a necessary party (91 Cal. 492, 167 Cal. 459, 135 Pac. 719), it is considered good practice to include the record beneficiary, or for the trustee to advise him or his assignee of the suit where practicable.

SEARCHER'S DUTY EXAMINING SALES:

Check the recitals in the trust deed against those in the trustee's deed. The salient points to be examined are as follows:

The dates of the respective instruments and the book and page of the record should be checked to identify the instruments. Care should be exercised to see that the terms

of the trust deed as to demand and default are duly recited; that notice has been given in accordance with the law, and at the place specified. If the trust deed provides in terms that the recitals in the trustee's deed as to all the salient points shall be conclusive, then such recitals in the deed from the trustee may be so regarded.

A comprehensive monographic note in relation to Sales and Conveyances by Trustees will be found in 19 Am. St. Rep. 266.

BENEFICIARY BANKRUPT:

A bankrupt cannot request rightfully a reconveyance of a trust deed in his favor. After adjudication the trustee can compel surrender of all assets of the bankrupt. (184 U. S. 1.) The trustee may recover the debt a second time. (Am. Rep. 523 and 325.)

BUSINESS TRUSTS

The common law or "Massachusetts Trust" so called, largely in use in Eastern States as a substitute for the corporate form of existence, has appeared of late years upon the public records in California in connection with real estate transactions. So varied are the forms of the trust agreement under which they operate that, in the absence of definite court decisions applicable in all cases, each of such trusts must be treated upon its own merits and the construction of the trust agreement referred to counsel for opinion for its legality or otherwise.

In measuring the legality of a business trust declaration it should be borne in mind that the only express trust allowed in this State are those enumerated under Sec. 857, C. C.

If the trust agreement is within the scope of this section, it is apparently lawful. If the trustees do not take control under and draw their powers from the trust instrument alone, but are under the control of the so-called shareholders, then probably a partnership has been created.

The California Constitution, Art. XII, Sec. 4, defines "Corporations" as including "all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships". If this applies to a trust not strictly within the terms of 857 C. C., it would probably be classed as a corporation illegally formed.

As to the deed to the trustees, equity will sustain a grant to trustees of an unincorporated voluntary association

when a valuable consideration has been paid to the grantor. (Ruddick vs. Albertson, 154 Cal. 640.) The trustees would hold the legal title under a resulting trust without power to grant except to the beneficiaries or with their joinder as grantors in the deed.

The Corporate Securities Act of 1917 (Blue Sky Law) defines the word "Company" as including "all associations, joint stock companies and partnerships of every kind" and claims jurisdiction over business trusts. The Commissioner of Corporations has issued many permits to sell the securities of these trusts.

There is an Oregon decision (Superior Oil & R. S. vs. Handley, 195 Pac. 159) which held that under the Bank Act only "a corporation duly organized for that purpose" can transact a general trust business in that State. This case involved a mandamus to the Corporation Commissioner to compel him to issue a permit to sell shares in a business syndicate. The court found the Commissioner had no jurisdiction, that the contemplated sale of beneficial interest certificates was "doing business" in Oregon and was governed by the laws regulating trust business within the State. The California Bank Act is in accord with the Oregon statute as to the control of trust business and may be held to apply to such trusts in this State (though our Corporation Commissioner under the Blue Sky Law controls the sale of stock), which forbids transaction of trust business "except by means of a corporation duly organized for such purpose". The only rule for general application that can be given is

"BE CAREFUL AND CONSULT COUNSEL".

(End of Subject)

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